

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

JUNE 6, 2006

+ + + + +

The Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 9:30 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice-Chairperson
CURTIS ETHERLY, JR.	Board Member
JOHN MANN, II	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

CAROL MITTEN	Chairperson
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OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Deputy Secretary
BEVERLEY BAILEY	Sr. Zoning Specialist
JOHN NYARKU	Zoning Specialist
TRACEY W. ROSE	Sr. Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL:

SHERRY GLAZER, ESQ.
JACOB RITTING, ESQ.
LORI MONROE, ESQ.

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OFFICE OF PLANNING STAFF PRESENT:

STEVE COCHRAN

The transcript constitutes the minutes
from the public meeting held on June 6, 2006.

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P-R-O-C-E-E-D-I-N-G-S

10:40 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. Let to call to order our public meeting of the 6th of June, 2006. My name is Geoff Griffis, Chairperson. Joining me today, of course, of the Vice-Chair Ms. Miller and Mr. Etherly. Representing the National Capital Planning Commission is Mr. Mann. We have differing Zoning Commissions that have participated on several of the cases this morning for decision. As they are available, they will come out and join us.

Copies of today's hearing agenda are available, of course, for you where you entered into the hearing room. You can pick that up. We do have an awful lot on our agenda for the meeting this morning so we are going to get straight into it. We will not be changing the chronology of that listed on the schedule. We'll roll through as they are printed and have been published.

I'm just going to ask that everyone just if they would turn off cell phones and any sort of other noise-making devices so that our transmission of our deliberation is not interrupted. Of course, in the public meeting all cases that we are going to call

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1 for decision have been heard. The records have been
2 closed. There were filings on numerous cases that
3 were requested. Most have come in.

4 We will make note of what has been
5 accepted into the record and what has not been
6 accepted if that is particular to each individual
7 case. There is not an opportunity for the public
8 participation in our morning session, of course, our
9 public meeting, as visually you can probably see.

10 We have full records before us and we will
11 move ahead for our own deliberation on these.

12 With that, let me say a very good morning
13 to Ms. Bailey, Ms. Rose, Ms. Glazer, and Mr. Moy, who
14 will be ably assisting us in numerous capacities.
15 However, at this point I think we should move straight
16 ahead to call the first case for deliberation.

17 MR. MOY: Yes. Good morning, Mr.
18 Chairman, Members of the Board. The first case for
19 decision making is the Appeal No. 17439 of the
20 Advisory Neighborhood Commission G-A, pursuant to 11
21 DCMR 3100 and 3101 from the administrative decision of
22 the Zoning Administrator, Department of Consumer and
23 Regulatory Affairs (DCRA) to issue Certificate of
24 Occupancy, Permit No. 102037, dated July 27, 2005,
25 authorizing a 49-seat restaurant use ("Cluck-U-

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1 Chick").

2 Appellant alleges that DCRA erred by
3 issuing the C of O for a fast food restaurant without
4 Board of Zoning Adjustment special exception review
5 under Subsection 733. The subject property is located
6 in the HS (H Street Northeast Commercial Overlay/C-2-A
7 District at premises 1123 H Street, N.H.E. (Square 982,
8 Lot 823).

9 On April 25, 2006, the Board completed
10 public testimony on the appeal application, closed the
11 record, and scheduled its decision on June 6, 2006.
12 The Board requested no additional information for the
13 record. The Board is stacked on the merits of the
14 appeal from the ANC-6A on No. 1 and No. 2.

15 Mr. Chairman, there is the property
16 owner's motion for judgment as a matter of law.
17 That's in your case folders as Exhibit 26 which is
18 dated April 25, 2006.

19 Finally, we also have a preliminary
20 matter. The Board received after the record was
21 closed a letter from Council Member Kwame Browne dated
22 April 25, 2006, and I'll leave it at that. That
23 completes the status briefing, Mr. Chairman.

24 CHAIRPERSON GRIFFIS: Excellent. Thank
25 you very much. Let's take the first preliminary

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1 matter, Board Members, that are participating on this
2 case. We have a filing, as Mr. Moy has indicated,
3 came in after the record was closed. It is my
4 understanding that none of us have actually seen that
5 and received it.

6 I would suggest that we not open up the
7 record as we would need to in a motion to open up the
8 entire record to accept that in but rather move ahead
9 with our record as it has been complete. I'll take
10 any other discussion on that or any opposition to it.
11 Very well.

12 Not noting additional comments, I'll take
13 it as a consensus of the Board then to keep the record
14 closed, therefore, returning that letter. Of course,
15 in the future we will look to receiving letters from
16 all participants and certainly counsel members and
17 hopefully we will update them on the timeliness of
18 getting those submissions in.

19 The other preliminary matter, as Mr. Moy
20 has indicated, is that we do have a motion for summary
21 judgment in this case. I'll take a brief deliberation
22 on that but I would move that we deny the motion for
23 summary judgement on this case and ask for a second.

24 VICE-CHAIRPERSON MILLER: Second.

25 CHAIRPERSON GRIFFIS: Thank you very much.

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1 I think it is essentially moot at this point as we are
2 about to go into a full deliberation and finish the
3 case. If not, it would be just redundant to take it
4 up in a motion.

5 We had held that in abeyance noting that
6 there was a possibility that we might entertain that
7 at some juncture as it was somewhat efficiently and
8 effectively presented. As we move through this I
9 think it was properly done in abeyance but we need to
10 dispense with that now. Others comment on the motion?

11 VICE-CHAIRPERSON MILLER: I just would add
12 that I think there are facts in dispute that are
13 pertinent to our decision and that would be another
14 reason to deny it.

15 CHAIRPERSON GRIFFIS: Excellent point.
16 Anything else? Very well. We have a motion before
17 us. I would ask for all those in favor signify by
18 saying aye.

19 ALL: Aye.

20 CHAIRPERSON GRIFFIS: Opposed?
21 Abstaining?

22 Mr. Moy, why don't we just record the vote
23 on that preliminary matter.

24 MR. MOY: Yes, sir. The staff would
25 record the vote as three, zero, two, the motion of the

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1 Chair to deny the motion for summary judgment,
2 seconded by Ms. Miller. Also in support of the
3 motion, Mr. Mann. We have a Zoning Commission Member
4 not present and not voting and a Board Member who is
5 recused on this case.

6 CHAIRPERSON GRIFFIS: Excellent. Thank
7 you very much. Let's get into the substance then of
8 the Appeal No. 17439 which is, of course, for the
9 establishment and whether an error was created when
10 the issuance of a Certificate of Occupancy from the
11 Zoning Administrative. That being, it should have
12 come under the classification of a fast food
13 restaurant, of course, would then take some relief or
14 would not be allowed matter-of-right, or whether this
15 fits into the definition which was properly issued.

16 This was very clear and straightforward in
17 terms of points. Often appeals may not be. There may
18 be five or six differing points. I would note that
19 the ANC who brought the appeal raises two issues, they
20 say. I find them very similar and so close that I
21 really looked at this as a singular issue as whether
22 it was properly defined as a fast food or as a
23 restaurant looking at, of course, what was before the
24 Zoning Administrator at the time of which review and,
25 therefore, issuance of the Certificate of Occupancy.

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1 The record, I think, is very full on that.
2 I think we are at a unique position from the Board's
3 perspective as we are the appeal body for this clearly
4 in the appeal we will look to any of the documents
5 that would have been available to the Zoning
6 Administrator. I think also in our capacity and as
7 part of our jurisdiction and direction we are able to
8 look beyond what was immediately available into a more
9 full evidentiary findings and hearings on this case.

10 I think we have done that. I think there
11 is a lot of evidence that was presented in this appeal
12 that I think we found useful and I think found
13 appropriately and jurisdictionally available to us.
14 That being how it's operating currently. There is
15 certainly no way the Zoning Administrative would have
16 been able to know how it operates today in the
17 issuance of a C of O prior to its opening.

18 Why is that prevalent? Well, of course,
19 it's prevalent because our zoning definition really
20 hinges on how one is to operate. I'll start with the
21 very beginnings of the two elements that I think we
22 looked at, or I looked at, in terms of my deliberation
23 on this.

24 I think the ANC is in good position to be
25 protective of the difference between fast foods and

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1 restaurants. I think they were deliberate, clear, and
2 articulate in bringing their case. But when posed for
3 our judgment on whether an error was created, I think
4 first we begin with what the Zoning Administrative
5 would have before them.

6 There is the filings and the affidavits of
7 how this would be programmed, designed, and developed.

8
9 Certainly you have the plans that were
10 permitted and then you have the affidavit. I don't
11 see anything that was persuasive in terms of the error
12 that was created by the Zoning Administrator in
13 issuing a C of O at that juncture. As we open up even
14 further and step beyond that, still in the shoes of
15 the Zoning Administrator in looking as we venture
16 forward in time, we look at whether this establishment
17 fits into the definition of a fast food restaurant.

18 I'll pause for a moment and just say that
19 this is one of the most -- I have almost run out of
20 adjectives to describe poorly written sections in our
21 regulations but this is one that needs a heck of a lot
22 of work. I know that we are pulling together things
23 to recommend that to be relooked at.

24 We have the difference between a fast food
25 restaurant and a restaurant. How when one tips itself

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1 into fast food there is a certain amount of usable
2 space for sitting and queuing. Then we look at the
3 difference between how much prepared food and the
4 packaging and disposal and all these things, all very
5 functional aspects which isn't inappropriate to look
6 at it that way. I just wonder if it is actually
7 serving the intent overall of what we are trying to
8 limit or safeguard from.

9 That being said, going directly to this
10 case, there was an awful lot of evidence that was
11 presented from photographic evidence to documentation
12 to additional plans. As you recall, we had extensive
13 discussion about whether there was a dishwasher or not
14 and whether one was on order. For me that was not
15 pertinent.

16 It was an interesting indication or level
17 of understanding of the operation but when shown, in
18 fact, the amount of dishes, the amount of silverware,
19 the wash sinks that, of course, that they treat all
20 that properly at the restaurant, it was shown to me
21 and it was very persuasively shown that this was, in
22 fact, falling into the definition of a restaurant and
23 not tipping into that element of the second points
24 that would have made it part of a fast food
25 restaurant.

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1 That is the frame of my deliberation at
2 this point. Let me open it up to others for further
3 discussion and then we'll move back into it.

4 MR. MANN: Mr. Chairman, could I just ask
5 a couple of questions to clarify some of what you
6 said?

7 CHAIRPERSON GRIFFIS: Absolutely.

8 MR. MANN: I'm going to reiterate a little
9 bit what I think I heard. It seems to me as we were
10 listening to the testimony in this appeal that some of
11 it seemed to go to the actual issuance of the C of O
12 and some of it seemed to be more addressing the post
13 issuance operation of the restaurant. It became a
14 little murky as to whether or not we were supposed to
15 simply be addressing all the information prior to the
16 issuance of the C of O or if we could take into
17 consideration the ongoing or current operations of the
18 restaurant. Am I right so far?

19 CHAIRPERSON GRIFFIS: Yes.

20 MR. MANN: Okay. So what I think I heard
21 you say was that it's okay in our deliberations if we
22 take into consideration the whole universe of
23 information that we heard rather than simply if we
24 were to kind of somehow be able to put in
25 chronological order every bit of information that ever

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1 occurred in this application.

2 There is not a particular cutoff time or
3 what is it that allows us to consider a greater
4 universe of information prior to just the information
5 that was available to the Zoning Administrator prior
6 to the issuance of the C of O?

7 CHAIRPERSON GRIFFIS: That's an excellent
8 question. I think, first of all, our review is
9 primarily based on the facts that were presented to
10 DCRA or the Zoning Administrator. I think that we are
11 able to open up to see more of the evidence that is
12 currently presented based on the fact that -- well,
13 specifically in this case it's based on the fact of
14 the definition goes to use and programming and how it
15 is actually done.

16 I think there is nothing that precludes us
17 or prohibits us from looking at that evidentiary
18 information that is now available as opposed to the
19 fact that it was not available to the Zoning
20 Administrator. What would be more difficult is if it
21 was in conflict and then we would be in a different
22 situation. I still think we would have the
23 jurisdiction and the ability to look at that. That it
24 isn't in confidence we don't have to step into that
25 element. Does that address?

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1 MR. MANN: It does address. I would say
2 it certainly help make the murky a little less murky
3 because the more information we had the clearer some
4 of the aspects of the operation of this restaurant
5 became to me.

6 CHAIRPERSON GRIFFIS: Right. Good. I
7 don't think it's any different than some of the other
8 appeals that we looked at. In fact, I don't want to
9 site case or go to directly to this, but my thought is
10 that we step in the shoes of the Zoning Administrator,
11 of course, as an appeal.

12 Say we were having an appeal of an
13 issuance of a permit, if there was further
14 documentation that we thought necessary in order to
15 make a judgement, we would be able to ask the
16 applicant in this proceeding to provide that even
17 though, or perhaps the Zoning Administrator didn't at
18 that time.

19 To me this is a simple step or small step
20 in the same direction and that that we have that
21 evidence available, or potentially available. Let us
22 be able to have that presented to us and then both
23 sides can obviously deal with it as in the hearing.

24 Yes, Ms. Miller.

25 VICE-CHAIRPERSON MILLER: I guess the way

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1 I see it is that the first question is whether the
2 Zoning Administrator erred in issuing a Certificate of
3 Occupancy. When we are looking at that we need to
4 look at what information was available to the Zoning
5 Administrator or what information he should have
6 looked at.

7 Then in these proceedings if more
8 information comes in showing that, in fact, the
9 restaurant was actually acting as a fast food
10 restaurant in violation of the C of O, I think we
11 would have the authority to make that finding and the
12 ZA would then have the direction to take enforcement
13 action.

14 But with respect to the first question
15 which is the primary question I think before us, in
16 addition to what you stated about what did the ZA have
17 before him in making a decision on whether or not this
18 was a restaurant or a fast food restaurant. In
19 addition to the affidavit we also had in the evidence
20 Mr. Parker did a site visit and looked at the
21 tableware and did not find disposable tableware so
22 things like that were also in the record, and he
23 looked at the queuing area.

24 I think that the ANC had some real
25 concerns that did get aired in the hearing and caused

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1 some concern because this particular type of
2 establishment is a chain. What came out at the
3 hearing was the operation here was not necessarily the
4 same as that which was on college campuses and other
5 areas where, in fact, they were marketing to a
6 different audience. In fact, they did have fast food
7 restaurants in their name in other places.

8 I think that a lot of the evidence that
9 did come in with the ANC, of course, came in after the
10 C of O was issued so that did raise the issue of
11 whether or not they would then have been violating the
12 C of O. I think that the ANC bringing the appeal had
13 the burden of proof, though, in this case. There are
14 a few problems under the definition. The first as the
15 queuing prong and I think that was a little bit murky
16 and unclear in the definition.

17 Therefore, the hearing focused on the
18 following two prongs, whether or not 60 percent of the
19 food items were already prepared or packaged before
20 the customer placed an order, and whether or not the
21 food was primarily served in disposable containers and
22 disposable tableware. We heard different evidence on
23 it but I didn't see evidence that 60 percent of the
24 food items were already prepared or that the majority
25 was in disposable tableware.

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1 Therefore, I don't see that the ZA erred
2 in this case.

3 CHAIRPERSON GRIFFIS: Excellent. Anything
4 else? Other elements to be brought up? If there else
5 for deliberation, I think we should move to action on
6 this and that would put us to a motion. I would move
7 we deny Appeal No. 17439 of the Advisory Neighborhood
8 Commission 6-A and would ask for a second.

9 VICE-CHAIRPERSON MILLER: Second.

10 CHAIRPERSON GRIFFIS: Thank you very much.
11 I think we have hit the critical issues of this. I
12 think there is an awful lot of detail that went into
13 this in preparation. I do appreciate everyone
14 participating in this and putting together such good
15 detailed factual basis for our deliberation and
16 judgment.

17 One of the pieces that I looked at
18 somewhat we have seen it before and I just want to
19 make a small note of it. It's not really that big of
20 an issue. The element of how one advertises reminded
21 me of you talking about this being connected to other
22 franchises or other locations and their functioning.
23 We have in numerous cases of appeals and infractions
24 presented evidence of websites or advertising or
25 yellow book pages and I think we have found it not to

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1 be that persuasive of the actual zoning elements.

2 We're speaking to those zoning elements.
3 One might call themself something in advertising which
4 is different than what it is as defined in our Zoning
5 Regulations. Of course, we are tied to the
6 regulations and how that is implemented, reviewed,
7 whether properly applied. The other aspect of that is
8 we had some testimony in the record regarding the
9 appropriateness of retailers and investment on H
10 Street, all very human factors with this and all very
11 important factors in terms of the city.

12 As I've said before, ours is a charge that
13 is very dry and almost distant from those elements in
14 looking at the base facts of things and so I didn't
15 find personally in my deliberation looking at the
16 overall good of H Street and how we would factor all
17 that in, but rather very close point of the issuance
18 of the C of O, is it properly done with the Zoning
19 Regulation. I find it much more interesting to look
20 at the large picture and see how we animate our city
21 neighborhoods but that's not what we're here to day.

22 Okay. With that then I'll open it up for
23 any last comments. Ms. Miller.

24 VICE-CHAIRPERSON MILLER: I just want to
25 acknowledge that there certainly was in the record

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1 some photographs from the ANC and testimony about the
2 use of disposable tableware at the restaurant. It
3 just didn't rise to the level of 60 percent and wasn't
4 sure when this happened. Certainly that is after the
5 fact which would go to the enforcement aspect. That
6 was then counted by the applicant with a lot of
7 evidence about the amount of regular dinnerware and
8 stuff.

9 CHAIRPERSON GRIFFIS: Excellent. As well
10 as takeout which is available.

11 VICE-CHAIRPERSON MILLER: That's right.
12 They do have some takeout and they are allowed to have
13 some takeout so it was, again, a question of quantity.

14 CHAIRPERSON GRIFFIS: Right. It's all a
15 matter of proportionality obviously is the way the
16 definition is looked at and the difficulty, as I was
17 saying earlier on, the measuring level of
18 proportionality is difficult at best to ascertain or
19 may not, in fact, regulate that of which it's really
20 supposed to protect. That goes deeper into the actual
21 definitions than this particular case.

22 MR. MANN: Just to go to Ms. Miller's
23 point earlier about the amount of food that is
24 prepared in advance, I mean, it depends on how you
25 want to define that. I mean, some prep work has to be

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1 done in any restaurant situation. You can take that
2 definition and twist it however you would like but I
3 think she is right in this point. It's not like the
4 food was prepared in advance because it was
5 exclusively a fast food restaurant.

6 CHAIRPERSON GRIFFIS: Right. Good. Okay.
7 Anything else then?

8 VICE-CHAIRPERSON MILLER: I guess I also
9 want to add that I think there were certain signs
10 there that I can understand that the ANC would look
11 into whether or not this was a fast food restaurant
12 but I think a lot of evidence came out in the hearing
13 including testimony by the business owner about their
14 intent and about their supplies and their operation.
15 I think that was convincing that they were not, in
16 fact, intended to be fast food or that they were a
17 restaurant.

18 CHAIRPERSON GRIFFIS: Excellent. Anything
19 else?

20 MR. MANN: Only to reiterate what you said
21 earlier and I think the best fix would be to have the
22 Zoning Commission change the definition of fast food
23 restaurant or restaurant so that we don't continue to
24 face this problem.

25 MS. BAILEY: Right. I appreciate that.

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1 That is actually an interesting place to end because
2 I think there are two reasons actually to look at
3 that. One is to clarify the language and the intent
4 of it. Secondly, I think, quite frankly, is to update
5 it to make it a little bit more contemporary and
6 certainly to address numerous and new uses that are
7 coming into urban areas.

8 Very well. If there is nothing further
9 then, we do have a motion --

10 MR. MOY: Mr. Chairman, if I may before
11 the Board votes, to note for the Board that we do have
12 an absentee ballot from Ms. Mitten and she had asked
13 that her comments be read into the record so the
14 staff's feeling is up to the Board whether you want
15 her comments read before you vote or after you vote.

16 CHAIRPERSON GRIFFIS: Let's have them now.

17 MR. MOY: I'm sorry. Did you say after?

18 CHAIRPERSON GRIFFIS: No.

19 MR. MOY: Oh, I'm sorry. Okay. "An
20 important distinction has been made throughout this
21 case. The appeal before us is whether the Zoning
22 Administrator erred in issuing the C of O for the
23 subject establishment as a restaurant, not whether the
24 establishment was operating within the bounds of that
25 C of O. The answer to the question of the validity of

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1 the issuance of the C of O turns on whether the ZA was
2 justified in relying on the representations of the
3 business owner. In this case, I believe he was.

4 If we accept that the 10 percent
5 queuing/seating measurement was met, then we only need
6 focus on the remaining test for a fast food restaurant
7 regarding the amount of food prepared in advance or
8 the extent of the use of disposable containers. I
9 think the ZA had ample evidence to suggest that this
10 would not be a fast food restaurant.

11 I think the ANC in this case may have been
12 better served by seeking DCRA's assistance in bringing
13 the establishment into compliance with the restaurant
14 C of O rather than questioning the issuance of the C
15 of O in the first place. There is certainly evidence
16 that suggest that at least for some period of time the
17 subject restaurant may have been out of compliance
18 with the C of O. For instance, by greater reliance on
19 disposable containers than was intended.

20 Everyone has conducted themselves in this
21 case with the same goal in mind, to ensure that this
22 establishment operates for the good of the
23 neighborhood without creating adverse impacts. I hope
24 the parties will remember they are on common ground
25 when they leave here today. This establishment is

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1 precisely what the H Street corridor needs to support
2 the revitalization efforts there."

3 CHAIRPERSON GRIFFIS: Excellent. Thank
4 you very much, Mr. Moy. Very well.

5 Is there anything further?

6 VICE-CHAIRPERSON MILLER: I just want to
7 say that I guess Ms. Mitten made a premise about if we
8 assume that the 10 percent is met, and I think we
9 don't even need to assume that because if the A & B
10 are met and if we address the disposable items and the
11 prepackaging, if we look at those factors and make a
12 finding as to those, we don't even need to make a
13 finding as to the queuing.

14 CHAIRPERSON GRIFFIS: Um. Interesting
15 point. I'm not sure I agree with it 100 percent but
16 it's an interesting point to bring up. Do you go to
17 the definition of A & B first and then back into the
18 base or do you start with the fast food restaurant
19 definition and it has to find one or other of the next
20 A & B? I don't think we need to differentiate that.

21 I think I understand your point in terms
22 of Ms. Mitten's comments. Perhaps there are two
23 points that we need to make clear for the record. In
24 this deliberation no one has said persuasively that we
25 have found the 10 percent was met or not met. We

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1 haven't reached that level in our finding that we need
2 to in terms of determining the appeal.

3 The second is I don't want to leave on
4 the record that the way you read the definition is
5 from the end to the beginning rather than the
6 beginning to the end.

7 VICE-CHAIRPERSON MILLER: I just read it
8 as an "and", to find the queuing and you find one of
9 the other two.

10 CHAIRPERSON GRIFFIS: Right.

11 VICE-CHAIRPERSON MILLER: Okay. And that
12 we didn't find one of the other two so, therefore, we
13 didn't need to reach the queuing question.

14 CHAIRPERSON GRIFFIS: But we need to be
15 definitive on it. Okay. Very well. Anything
16 further? If there is nothing further then, we do have
17 a motion before us that has been seconded. I would
18 ask that all those in favor signify by saying aye.

19 ALL: Aye.

20 CHAIRPERSON GRIFFIS: And opposed?
21 Abstaining?

22 Mr. Moy.

23 MR. MOY: Yes, sir. The staff would
24 record the vote as three to zero to one on the motion
25 of the Chair, Mr. Griffis, to deny the appeal,

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1 seconded by Ms. Miller. We have a Board Member
2 recused on the case. As I said earlier, we have an
3 absentee ballot from Ms. Mitten and her vote was to --
4 rather is to deny the appeal so that gives a final
5 vote of four to zero to one.

6 CHAIRPERSON GRIFFIS: Excellent. Thank
7 you very much. Let's move ahead.

8 MR. MOY: The next case is Application No.
9 17477 of Lillian K. H. Audette Revocable Trust,
10 pursuant to 11 DCMR 3103.2, for a variance to permit
11 the location of a parking space serving a single-
12 family dwelling in the front yard under Subsection
13 2116.2, in the R-3 District at premises 2407 27th
14 Street, N.W. (Square 1300, Lot 327).

15 On May 23, 2006, the Board completed
16 public testimony on the application, closed the record
17 except for specific post-hearing documents from the
18 applicant. The applicant was to supply descriptive
19 narrative of photographs that was submitted at the
20 time of the hearing on May 23rd. That filing was made
21 and is identified in your case folders as Exhibit 30.

22 In conclusion, Mr. Chairman, the Board has
23 also received a letter from the applicant dated May
24 31, 2006, requesting that the Board reopen the record
25 to receive additional pieces of evidence. The Board

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1 should take that up as a preliminary matter, Mr.
2 Chairman.

3 CHAIRPERSON GRIFFIS: Excellent. Thank
4 you. Very well. Let's move ahead then. Mr. Moy is
5 absolutely correct we do have a request -- a motion
6 rather to open the record on this. Of course, the
7 record is closed. We cannot accept anything else and
8 that is not a waivable regulation but rather we would
9 have to make a motion and reopen the record on our
10 accord to accept this.

11 I have no difficulty in doing such and, in
12 fact, would open the record for additional information
13 that was not presented by the applicant. Let me frame
14 my entire thought on this first. As we always do, we
15 speak our minds on the record, in the open, and before
16 the public. I'll begin with when I first prepared to
17 here this case. We have heard similar under this
18 section.

19 I was very, I must say, pessimistic of the
20 validity of moving forward reading the facts and
21 knowing the regulations. However, coming out of the
22 hearing which, again, underscores the importance of
23 public hearings and able to have testimony presented,
24 I was strongly persuaded to a level of being more
25 supportive of the application.

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1 With that framework in mind without going
2 into the deliberation of the facts and the test in
3 this case, I think that I would advocate for opening
4 the record to accept the filings that were outside of
5 what we requested. Of course we requested the
6 photographs and the narratives. I would also request
7 that the applicant submit a more detailed plan of
8 proposed work.

9 There is testimony written and also oral
10 on the small enclosure or the wall and some plantings
11 some of which sound as if they would be temporary or
12 not. I think one of the major pieces that will be of
13 importance in our deliberation on this and, frankly,
14 for my support of it will be that this would not have
15 any significant detracting from the overall area or
16 impact negatively.

17 Of course, that's a small element of the
18 overall test in the variance not getting into too much
19 of the detail. I think it would be very important to
20 have that in. I regret that I hadn't focused and been
21 more articulate of that during the hearing. I think
22 we have an opportunity here and I would suggest to put
23 it all together that we would have that submitted in
24 and could set this for a special public meeting
25 conceivably in a week.

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1 Let me hear comments on that and then I'm
2 going to have -- as we have opened up the record on
3 this, if we so do, I will just have the applicant's
4 representative speak just to the scheduling element of
5 that.

6 VICE-CHAIRPERSON MILLER: I just want to
7 add to your comments about the significance of this
8 landscaping or architectural plans showing what the
9 parking pad and surrounding landscape would look like
10 because at the hearing one of the issues we explored
11 a little bit was what the intent of this parking
12 regulation and one of it -- part of it goes to
13 aesthetics and that is really one of my primary
14 concerns that if, in fact, this is going to be
15 something that we can see is going to be aesthetically
16 acceptable. That is very important.

17 CHAIRPERSON GRIFFIS: Others? Is there
18 any opposition to opening the record to the additional
19 information the Board is requesting? Very well. If
20 not, I note to the representative of the applicant
21 just to have you address in terms of scheduling and
22 I'll take any questions that you have for clarity of
23 what is being requested.

24 MR. CARROLL: For the record, Tom Carroll
25 with the law firm of Holland & Knight representing the

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1 applicant. As for scheduling, just speaking with the
2 applicant now, he suggested perhaps a month in the
3 sense that he has to go back and talk to the architect
4 and the engineer. We would like to have sufficient
5 time to get you what you'd like.

6 CHAIRPERSON GRIFFIS: Okay. I don't have
7 any difficulty with that. We can just set that then
8 for the July meeting which would be the 11th.

9 MR. CARROLL: That would be fine.

10 CHAIRPERSON GRIFFIS: Okay. So filing
11 would be seven days prior or as soon as it's
12 available.

13 MR. CARROLL: Then I guess I would just
14 ask for any further detail of what you would like to
15 see besides the retaining walls that we spoke of, the
16 flower boxes, the hanging --

17 CHAIRPERSON GRIFFIS: Good.

18 MR. CARROLL: The site plan.

19 CHAIRPERSON GRIFFIS: It would be my
20 assumption if this was successful and it was going to
21 be built, then there would be documentation to show a
22 contractor what they would actually build. I think
23 we're not looking for full permanent documents but
24 rather something that is illustrative of what is being
25 proposed and what will be built if approved.

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1 It would be very helpful, of course, to
2 have a plan that showed the dimensions of the curb cut
3 and the parking area, the dimensions of the wall and
4 plan. If possible, I would think that a simple
5 elevation, or at least some indication narratively of
6 the material and the height of any of the enclosing
7 areas.

8 MR. CARROLL: That would be fine.

9 CHAIRPERSON GRIFFIS: Okay. Anything
10 else? I guess we would include in that plan if there
11 is any sort of areas for planting temporary or
12 permanent and how that might be animated, of course.
13 A small area. It shouldn't be that cumbersome in
14 terms of the detail that is required.

15 MR. CARROLL: Thank you.

16 CHAIRPERSON GRIFFIS: Okay. Excellent.

17 Mr. Moy.

18 MR. MOY: In terms of the date then, you
19 mentioned filing submissions a week prior to July 11th
20 which would be July 4th according to my calendar which
21 is a holiday so would you prefer July 3rd or July 5th?

22 MR. CARROLL: We would probably prefer
23 July 5th.

24 CHAIRPERSON GRIFFIS: 5th by 3:00.
25 Excellent. Anything else? Clarifications? Very

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1 well. Thank you very much. Do appreciate your
2 willingness to move this up a month and we'll look
3 forward to calling this for a decision on the 11th.

4 Okay. Let's move ahead then.

5 MR. MOY: The next case is Application No.
6 17480 of MissionFirst Development pursuant to 11 DCMR
7 3103.2 for a variance from the minimum lot width and
8 area requirements under Section 401 to allow the
9 construction of eight semi-detached dwellings in the
10 R-5-A district at premises 4675 H Street, S.E., 5001
11 and 5007 Benning Road, S.E. (Square 5362, Lots 193,
12 194, and 195.)

13 The staff would note that the applicant
14 has amended the application to pursue a special
15 exception under 3104.1 instead of the variance relief.
16 This would be still towards minimum lot width and lot
17 area towards Section 401.

18 On May 23, 2006, the Board completed
19 public testimony on the application and scheduled the
20 record -- and closed the record except for specific
21 post-hearing documents from the applicant which
22 included a landscape plan and a site plan with
23 dimensions. This was filed by the applicant on May
24 30, 2006, and is identified in your case folders as
25 Exhibit 34. With that I think the staff will conclude

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1 its briefing, Mr. Chairman.

2 CHAIRPERSON GRIFFIS: Excellent. Thank
3 you very much, Mr. Moy. I do appreciate that. Of
4 course, in calling this hearing this had been
5 advertised for a variance in our preliminary
6 deliberations and with concurrence with the Office of
7 Planning we had accepted that amendment to hear a
8 special exception for this Application 17480.

9 As Mr. Moy has indicated, we did leave the
10 record open. There was just one simple document that
11 we received and that was showing more graphically the
12 property lines and also adding the dimensions of the
13 property lines and the placement of each structure.
14 In addition we did ask for a landscape plan, both of
15 which have been provided.

16 I think we can get right into this. I
17 thought it was very persuasive case for special
18 exception for the eight semi-detached dwellings in the
19 R-5-A district and would rely on the Office of
20 Planning's position also in support and they did a
21 full analysis of this, of course, in the special
22 exception.

23 In the R-5-A it's an interest piece that
24 the Board looks at. Also a section that is written
25 for our view mostly, as I look at it, the intent of

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1 large, large developments that might happen over
2 several acres that may have individual buildings.

3 This somewhat steps into that but what we
4 are looking at in terms of this aspect was the fact
5 that the lots as they were laid out were not
6 dimensionally meeting the requirements of the
7 regulations. Of course, that can be and is covered in
8 the special exception review by the Board.

9 It's very persuasive evidence in terms of
10 what we would look at that they were similar if not
11 identical to the lots in the surrounding area meaning
12 fitting into the character. Certainly there was no
13 evidence presented by allowing the development of the
14 semi-detached on these lots that there would be any
15 sort of negative or detrimental impact that arose.

16 Actually there was some excellent
17 testimony from the ANC, I believe it was, that talked
18 about the appropriateness of new family developments,
19 the vacancy of the existing structure, and how this
20 would, in fact, reanimate that street in a way that
21 was very productive and, of course, was supported.

22 I think that's all I need to address on
23 this. Of course, there was not any persuasive
24 evidence or any evidence presented that this would
25 somehow not be in harmony with the zoned districts.

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1 Certainly R-5-A is a high-density residential and this
2 being even if it's being proposed as single family, at
3 best it would be flat or two unit, doesn't even step
4 into the amount of density that would be allowed under
5 differing scenarios in the R-5-A.

6 Others? Very well. If there is nothing
7 further then, I believe it's appropriate to move ahead
8 with a motion to approve Application 17408,
9 MissionFirst Development. That, of course, would
10 allow for the development and construction of a semi-
11 detached dwelling in the R-5-A districts of premises
12 4675 H Street, S.E., 5001 and 5007 Benning Road, S.E.
13 It's all on Square 5362, Lots 193, 194, and 195. I
14 would ask for a second.

15 MR. ETHERLY: Second, Mr. Chairman.

16 CHAIRPERSON GRIFFIS: Thank you very much,
17 Mr. Etherly. I will also make note of the fact and
18 specifically address in support of this application
19 was ANC-7E which had voted unanimously to support the
20 application and they brought substantive testimony to
21 us in regards to their support of that and, as I
22 indicated, the Office of Planning also in support. I
23 would open it up for any further deliberation on this.
24 Not noting any further comments, we do have a motion
25 before us. It has been seconded. I would ask for all

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1 those in favor to signify by saying aye.

2 ALL: Aye.

3 CHAIRPERSON GRIFFIS: And opposed?
4 Abstaining? Very well. Mr. Moy.

5 MR. MOY: Yes. Staff would record the
6 vote as four to zero to zero on the motion of the
7 Chairman Griffis to approve the application, seconded
8 by Mr. Etherly. Also in support of the motion Ms.
9 Miller, the Vice-Chair, and Mr. Mann.

10 We also have an absentee ballot, Mr.
11 Chair, from Mr. Hood and his vote is to approve the
12 application so that should give a final vote of five
13 to zero to zero.

14 CHAIRPERSON GRIFFIS: Interesting.
15 Excellent. Thank you very much. Let's move ahead
16 then.

17 MR. MOY: The next case is Application No.
18 17446 of Pauline S. Ney pursuant to 11 DCMR 3104.1 for
19 variances from the floor area ratio requirements under
20 Section 402, lot occupancy requirements under Section
21 403, rear yard requirements under Section 404, and
22 nonconforming structure provisions under Subsections
23 2001.3 and 2002.4 to construct six residential units
24 above existing one-story retail structures in the R-5-
25 B District at premises 2160-2162 California Street,

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1 N.W. (Square 2530, Lots 99 and 100).

2 Staff notes that the application has been
3 amended where the applicant withdrew zoning relief
4 from the floor area ratio requirements and the rear
5 yard requirements. The proposal now has been amended
6 to build two stories to consist of four residential
7 units.

8 On April 18, 2006 the Board completed
9 public testimony on the application, closed the
10 record, and scheduled its decision on June 6th. The
11 Board requested a number of post-hearing documents.
12 Staff won't go through those unless the Board would
13 like staff to do that.

14 Otherwise, staff would say that in your
15 case folders the Board has received a number of
16 filings, the first being a filing from the applicant
17 dated April 25, 2006, which I believe contains the
18 additional sun/shadow studies as requested and that is
19 identified as Exhibit 88.

20 Second, there is a filing submitted on May
21 9, 2006 from the appointed parties in response to the
22 applicant's sun and shadow submission. That is
23 identified in your folder as Exhibit 90. The next two
24 filings are draft findings of fact and conclusions of
25 law, one from the applicant dated May 30, 2006,

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1 identified as Exhibit 92, and on May 30, 2006, from
2 the opposition party identified as Exhibit 93.

3 We also have in your case folders, Mr.
4 Chairman, filing from the applicant as requested which
5 is a legend to the photographs that were submitted at
6 the hearing on April 18th and that is identified in
7 your folder as Exhibit 86.

8 The sixth filing is a letter dated April
9 25, 2006, from Council Member Jack Evans. That is
10 identified as Exhibit 87.

11 I think staff would like to conclude its
12 briefing with two filings as a preliminary matter.
13 There was a filing from the opposition party to reopen
14 the record which is dated June 6, 2006. Today, June
15 6, there was a filing to the office from the applicant
16 in rebuttal to that filing. So staff would conclude
17 its briefing unless the Board would care for more
18 information.

19 CHAIRPERSON GRIFFIS: Thank you very much,
20 Mr. Moy. It was an awful lot of information. My
21 hesitancy at this point is that you have indicated
22 that there was a filing after the record was closed of
23 which I just wanted to make clear was that a motion or
24 just additional filings?

25 MR. MOY: Staff's understanding, Mr.

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1 Chairman, is that it was a request to reopen the
2 record to admit new evidence into the record.

3 CHAIRPERSON GRIFFIS: I'm sorry for a bit
4 of confusion but the issue is that none of the Board
5 Members have seen this and so we are just trying to
6 ascertain -- of course, we are moving ahead with the
7 record being fully closed and how we make a decision
8 on that request because we don't want to step into the
9 substance of what's there but the reasoning behind why
10 we are being requested to open the record.

11 As I understand, perhaps some of the Board
12 members are firm in keeping the record closed and
13 moving ahead. Let's have a few comments on that
14 because we may need to take a minute and took at it.

15 MR. ETHERLY: Thank you very much, Mr.
16 Chair. I would tend to agree with the broad direction
17 of your comments. My concern is that the record has,
18 indeed, been closed in this proceeding. Perhaps as a
19 compromise suggestion, and it is, indeed, rare that we
20 would seek to receive comment during the deliberation
21 portion, during the public meeting portion.

22 I would perhaps be open to hearing some
23 brief discussion if the Chair was inclined to go in
24 that direction around the grounds for why this
25 information was not offered while the record was still

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1 open.

2 My concern is that the record has, in
3 fact, been closed. To look at the information, to
4 ascertain why it wasn't brought forward earlier, kind
5 of defeats the purpose of closing the record so that
6 would be my only concern. If that is somewhat clear,
7 that is pretty much where I'm at on that.

8 CHAIRPERSON GRIFFIS: I think that is very
9 clear.

10 Others?

11 VICE-CHAIRPERSON MILLER: Given that we
12 haven't seen this at all, I don't know if it's drafted
13 so that there is a motion that explains briefly
14 without telling us all the substantive information as
15 to why it needs to be reopened at this point to look
16 at this new evidence so we could address perhaps why
17 that wouldn't be necessary at this time. Without
18 knowing anything it's very difficult to make an
19 informed decision.

20 MR. MANN: I would also support not
21 accepting this into the record. My reasoning would be
22 because, as I understand the regulations, there are
23 already ways that this could be addressed. For
24 example, pending the outcome of today's deliberation
25 if we were to make a decision, there's some process by

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1 which whoever submitted the information could make a
2 motion for reconsideration. There are other avenues
3 by which this could be considered rather than just
4 simply submitting something after the record is
5 closed.

6 VICE-CHAIRPERSON MILLER: There is a
7 provision within 10 days of our final decision that a
8 party can make a motion to reopen the record and
9 reconsider at that point. There is a remedy down the
10 road for sure.

11 MR. MOY: Mr. Chairman.

12 CHAIRPERSON GRIFFIS: Yes.

13 MR. MOY: If I may add to help in your
14 decision, staff does understand from the opposition
15 party that the new evidence was evidence that they
16 believe was uncovered a day or two ago. That was, of
17 course, well after the hearing date.

18 CHAIRPERSON GRIFFIS: Okay. With that
19 limited understanding of that, I think what Mr. Mann
20 is indicating, I think, is probably the most correct
21 procedure to move ahead with as this was just found
22 information. We have the hearing and the record as
23 complete from what we were able to establish and that
24 if this was, in fact, something that could not have
25 been found before, it may, in fact, make that

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1 threshold test for a motion.

2 I don't see how we could -- it doesn't
3 seem to be wholly productive to stop the process of
4 what we've come to already in creating the record. I
5 must say I am not 100 percent persuaded on either side
6 with this. It just becomes a little bit more
7 difficult. There it is. I guess the question is do
8 we break and read this or do we move ahead as we are
9 here and schedule for a decision.

10 Mr. Etherly was indicating that perhaps be
11 supportive of finding out a little bit more
12 information in order to make that assertion. I think
13 the difficulty I'm balancing is that if we do that, we
14 will step into opening up the record and opening up a
15 limited but certainly a hearing on the case.

16 I think that gets to be a little bit
17 problematic. As opposed to last which we just opened
18 the record on which we had the filings way ahead of
19 time and it came in with submissions that we were
20 indicating in the smaller scale on that application
21 than what this one would be.

22 MR. MANN: Well, plus I might add that was
23 something where we were asking for just greater
24 clarification on something that had already been
25 entered into the record. We have no idea what this

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1 is.

2 CHAIRPERSON GRIFFIS: Indeed.

3 MR. ETHERLY: I definitely have no
4 objection to moving forward, Mr. Chair.

5 CHAIRPERSON GRIFFIS: Okay. I think that
6 is probably the most productive to do it as it's been
7 presented to us as new evidence that was not presented
8 prior. Not a clarification, as Mr. Mann has just
9 said, but new evidence of which would require a
10 hearing. The minute we touch it it will require us to
11 have everyone be able to address it from the applicant
12 and all the participants and parties.

13 That does reopen an entire hearing on it.
14 If it is appropriate for that to happen, there is, as
15 Mr. Mann and others have indicated, there is an
16 appropriate means to facilitate that but at this
17 point, I guess we should move directly and keep the
18 record closed and begin the deliberation on this case.

19 Are there any other preliminary matters,
20 Mr. Moy?

21 MR. MOY: Not on this case, sir.

22 CHAIRPERSON GRIFFIS: Indeed. Very well.
23 Let's begin then. As Mr. Moy indicated, of course,
24 during the course of the hearing in this case this
25 application was amended from when it was advertised.

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1 I think we are all very clear on how it was amended
2 and the scale and the mass.

3 We do have a particularly interesting, or
4 I should say complicated elements of this from 2001
5 and 2002 and the lot occupancy elements. We have an
6 existing structure that is being requested to be added
7 onto all of which are factoring into the elements that
8 were presented in the entire hearing. I'll open it up
9 for preliminary discussion.

10 VICE-CHAIRPERSON MILLER: Okay. Well,
11 this case is basically about variances, variance from
12 lot occupancy and then nonconforming structure
13 provisions under 2001.3 and 2002.4 and, as you said,
14 to construct residential units above an existing
15 retail structure.

16 The facts that I thought were key in this
17 case, there is an existing building already on the
18 property that is nonconforming as to lot occupancy and
19 rear yard. It covers 71 percent of the lot and 60
20 percent is allowed. It's over lot occupancy by 107
21 feet.

22 There are constraints on the property in
23 that it is an historic structure that needs to be
24 retained. They are planning on retaining an existing
25 grocery store that is a nonconforming use that has

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1 been grandfathered. According to the applicant's
2 architect the second floor can't be reconfigured to
3 comply with the 60 percent lot occupancy requirement
4 without jeopardizing the viability of the two bedroom
5 unit.

6 The two bedroom unit is critical to cover
7 the cost of the structural work and the preservation
8 component. That's my little synopsis of what I
9 thought the key facts were.

10 Moving into the variance analysis
11 framework --

12 CHAIRPERSON GRIFFIS: Before we dispense
13 with that, I think that is an excellent point as we
14 were looking at all this. Let's also go to parking.
15 The Board had some discussion on the parking and
16 whether it was, in fact, required. I think we were
17 fairly definitive in our review of this case that as
18 the regulations read -- I had them here at one point
19 -- that parking would not be required in this
20 application.

21 I'll get the site in a second. Oh, well.
22 Let's move ahead with that and I'll find my notes on
23 that as it becomes pertinent in addressing some of the
24 elements and issues that were brought forth in this
25 case.

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1 VICE-CHAIRPERSON MILLER: Okay. Moving
2 ahead into the variance analysis with respect to the
3 lot occupancy, the first prong of the variance test is
4 whether or not the property is unique or has some
5 exceptional condition. In this case the applicant has
6 asserted that the property is unique because it has on
7 it a contributing historic building that was
8 nonconforming with respect to lot occupancy and needs
9 to be retained. It also has on it a grandfathered
10 commercial building which is the grocery store. I
11 think the opposition said there isn't anything unique
12 with respect to the topography of the land itself.

13 However, the court cases are very clear
14 that the uniqueness does not have to adhere to the
15 land itself but can go to circumstances including, in
16 particular, the existence of an historic building on
17 the property. I think that prong has been met in my
18 view. I don't know if anybody else wants to -- okay.

19 To me the key prong in this case is that
20 of the practical difficulties. The way that the
21 statute and the regulation reads is that the strict
22 application of the regulation would result in peculiar
23 and exceptional practical difficulties upon the owner
24 of such property in complying with the regulations
25 under the Zoning Act.

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1 In this case the applicant has asserted
2 that it has practical difficulties in complying with
3 the regulations, that being it can't design a
4 structure to meet the lot occupancy requirements and
5 provide the two-bedroom unit that is critical to cover
6 the cost of the structural work and the preservation
7 components. The practical difficulties arise out of
8 the applicant's design and desire to add residential
9 to the existing structure.

10 The opposition has stated and they argued
11 that the practical difficulties -- they don't have a
12 practical difficulty in complying with the regulations
13 in that they have a profitable operation on the
14 property as it is so there is no practical difficulty
15 that the applicant will suffer that should be -- well,
16 should be honored with this variance.

17 I guess the question is what is the
18 standard for practical difficulty. I had asked the
19 parties to brief this a little bit. I really didn't
20 get that from the parties so I looked at the cases
21 myself to see what practical difficulties were upheld
22 in court cases. I know that the applicant cited the
23 Clerics case which was, I think, a use variance,
24 though, but that there were certain practical
25 difficulties that the applicant experienced that

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1 necessitated them to seek the variance.

2 In that case, it was societal changes that
3 made the use of the building of the seminary no longer
4 viable. In looking at other cases that dealt with
5 area variances, I found similar situations such as the
6 Delmonico case where the applicant would have been
7 forced to move and wouldn't have been able to recover
8 their financial investment.

9 This is a difficult issue because in this
10 particular case we heard testimony from the applicant
11 themselves that the operation that is there currently
12 is profitable so there isn't any practical difficulty
13 that is creating the need for them to do this to
14 construct this structure and seek the variance. The
15 practical difficulty arises solely out of being able
16 to do the design that they want to do to provide the
17 residences.

18 So practical difficulty as far as I can
19 understand under the laws of judgment that this Board
20 has to make is based on whether it's -- whether the
21 regulation is unduly burdensome so that we would grant
22 a variance. To me the question here is is it unduly
23 burdensome if this applicant were not allowed to go
24 forward with this design. In my view it's not unduly
25 burdensome because they are already operating at a

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1 profit. However, others might reach a different
2 conclusion. It is a judgment call.

3 The third prong is without substantial
4 detriment to the public good or without substantially
5 impairing the intent, purpose, and integrity of the
6 zone plan. So with respect to public good, it was a
7 little bit of a blur here with respect do we know it's
8 a different standard for special exception where you
9 are looking at light and air on neighboring
10 properties.

11 Public good is a more general standard.
12 However, the evidence that I focused on in this case
13 as being detrimental to public good includes the
14 effect on the apartment building, the Woodrow
15 Apartments, which there is evidence that it would
16 interfere with light and air. This is an area in
17 which there is already parking and traffic congestion.
18 This project would increase the parking and traffic
19 congestion.

20 Also there is an issue here with respect
21 to the public gathering space in front of this
22 property and there would be a detriment to that and
23 the ambience there. I don't think it interferes with
24 the impairment of the zone plan in the sense that the
25 construction is devoted to a conforming use and the

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1 nonconforming use, in fact, would be diminishing.

2 It only would be an impairment of the zone
3 plan if one were to conclude that there really was not
4 practical difficulty here because variances should be
5 exercised carefully and sparingly. If you grant it
6 where it's really not deserved, then in that sense you
7 are undermining the zoning scheme. Go ahead.

8 CHAIRPERSON GRIFFIS: Excellent synopsis
9 and full analysis. I'm sure we are going to hear more
10 on that position shortly. I think you have hit on a
11 critical issue for every application that we have, and
12 particularly this one. First of all, to start with,
13 I would absolutely agree with you that it is the test
14 of which represented are now within the Board's
15 judgment to decide. Martin does speak to that as
16 other cases do and, in fact, just the whole purpose of
17 our sitting and hearing.

18 I take a little bit of issue and I'm not
19 so sure of where you are landing on the practical
20 difficulty but let me begin with, first of all, I
21 think it's fairly persuasive that there is a unique
22 aspect to this property, and that is the existing
23 structure. That, of course, is even more so to the
24 fact that it is of historic interest. I'll leave it
25 at that. The fact that it is a nonconforming use and

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1 also in the massing and siting on the site so we have
2 those elements.

3 Now, what then steps into what you are
4 very articulately addressing is so now how do we look
5 at what the practical difficulty is? Really what we
6 always step on, I think, in looking at every
7 application the question of why do you need to do
8 this. Sometimes it is more persuasive a question than
9 others. I have to set back and say that is not the
10 threshold of which practical difficulty is based.

11 In fact, you said it several times, they
12 have an economically viable situation now. Why do
13 they need to do anything else? That is a fascinating
14 question. I think we have heard a lot of kind of
15 testimony on that. I don't find that to be
16 jurisdictional to the variance test in this particular
17 case.

18 I think it is informative in a lot of the
19 elements that you are talking about go directly to
20 what we're needing. We just need to somehow weave
21 them together perhaps, maybe just for my mind, but in
22 a different way. When you were talking about creating
23 a need for, what is creating the need for the
24 variance?

25 You seem to be landing on the fact of

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1 going back to that element of what is creating the
2 need for the variance if this is economically viable.
3 What I see as being put forth and not finding it
4 persuasive or not at this point I won't indicate, but
5 what I am seeing presented is not that this property
6 has to make more money. Therefore, we need to add
7 apartments onto it.

8 Rather, the application is coming to us
9 for relief from the regulations because it is not able
10 to comply with those elements of relief because there
11 is a stair configuration. There is a unit layout
12 configuration. There is an existing condition that
13 are factors of uniqueness but also creating that
14 practical difficulty.

15 You also indicated about the design
16 intent. That is critical here and it is important to
17 bring up for our discussion. I think we need to have
18 some substantive discussion on that because that
19 factors into our deliberation in numerous ways. I
20 understand what you're saying. Do it differently.
21 Make it conform somehow. I would step back and say I
22 think anything that was proposed would take some
23 relief.

24 However, the design is an interesting
25 element here because I think it does rise to a level

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1 of what we will look at or should look at,
2 particularly in this case but in others of whether it
3 would create any detrimental but would go, in fact,
4 against the public good or would impair the intent and
5 integrity of the zone plan.

6 Let's stick directly to the design. It is
7 reviewed by Historic Preservation Review Board. In
8 fact, that is one of the elements that is being put
9 forth as their practical difficulty and not able to
10 comply with the Zoning Regulations.

11 It is being asserted that because of the
12 direction under the review of which was put to the
13 preservation.

14 I understand that may be a little bit
15 contested which iteration and all that. The building
16 line is set at a certain place and that is what is
17 being asserted is creating an additional element of
18 practical difficulty and fully complying with the
19 regulations. Does that make sense?

20 VICE-CHAIRPERSON MILLER: It's just how
21 broad do you read the practical difficulties, I think.
22 When I look at the language and the statute, if we
23 apply the strict application of the regulation in this
24 case, they wouldn't be allowed to build. Would that
25 result in peculiar and exceptional practical

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1 difficulties to the owner of the property. Then we
2 make that assessment. I am saying that the results in
3 this case would be the status quo and would that be a
4 peculiar and exceptional practical difficulty.

5 CHAIRPERSON GRIFFIS: That seems to go to
6 question every applicant's intent. Unless we were
7 looking at fallow land in R-2 which couldn't be a
8 surface parking lot, what other situations would we be
9 in that we would ask that high a finding?

10 VICE-CHAIRPERSON MILLER: I think --
11 that's why I was looking at the court cases and they
12 may only capture some of the big cases or big issues.
13 For instance, in the 1700 block case the court was
14 saying at some point economic harm becomes sufficient
15 when coupled with a limitation on the utility of the
16 structure.

17 For instance, if there is a practical
18 difficulty in their being able to use the structure
19 profitably or whatever, I mean, in all the cases they
20 do seem to address -- in these cases, not just the
21 practical difficulty with respect to making their
22 design work but the underlying problems such as a
23 reduction in recreation space or someone would have to
24 move.

25 They seem to be looking at the bigger

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1 picture, not just -- I understand that there is a
2 practical difficulty in this case of making their
3 design work. That is clear because of the unique
4 situation of the historical building. I don't know
5 that is enough to say that it is unduly burdensome to
6 apply the regulation and have them not be able to go
7 forward.

8 I mean, a variance is not an entitlement.
9 It is something with strict tests. I guess it's a
10 question of do you think it is unduly burdensome to
11 apply it to them strictly where they can't read the
12 regulation. If they have a viable structure that is
13 there right now, I don't see it as unduly burdensome.
14 Especially when you look at -- well --

15 CHAIRPERSON GRIFFIS: It's an interesting
16 point because I understand your position. Do you find
17 that each of the variances that are being requested,
18 do you find that is not unduly burdensome in complying
19 with the regulations? Specifically, I could see how
20 you could argue under 403 lot occupancy what is
21 unburdensome. Just remove 107 square feet and we can
22 deal with that specifically but that is something out
23 of control.

24 How do you get past additions to existing
25 nonconforming? Am I understanding what you're saying

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1 is what you have is productive so because it's
2 nonconforming you aren't able to build on or add out
3 to the other parameters that are allowable in the zone
4 district?

5 MR. ETHERLY: Just to kind of add a little
6 bit of my kind of thinking, I think Mrs. Miller's
7 excellent analysis does raise an interesting point.
8 However, it is not one I necessarily agree with. The
9 way I'm talking Mrs. Miller's analysis it suggest to
10 me that if there is some minimal threshold of
11 viability or profitability that has been met or
12 established, then that essentially is kind of the end
13 of the game.

14 I'm stating that very roughly and very
15 unartfully so my apologies because you are a little
16 more detailed than that but just for the sake of
17 brevity. I just don't quite reach that with you. The
18 way I'm taking it is as the argument has been
19 proffered here, we have some desires with regard to
20 the size and layout of the units. We have a fire
21 stair egress issue or access issue that we are trying
22 to work around.

23 Clearly we have some HPRB considerations
24 that have to be handled here. Those three things
25 together interact in such a way as to create the

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1 practical difficulty. My concern perhaps, and maybe
2 this is a somewhat cleaner way of stating it, Mrs.
3 Miller, is the worry that the desire to reach a
4 certain threshold or residential use, I think, is what
5 concerns you.

6 If you are already at a certain measure of
7 viability and profitability in your project, why do
8 you simply need to do more and is a variance from the
9 Zoning Regulation the appropriate remedy for you to
10 simply do more with what you already have. My concern
11 is is that the appropriate question for the Zoning
12 Regs.

13 I'm trying not to make this too much of a
14 fun undergraduate course conversation because I feel
15 like I should be in Zoning 101 because it's one of
16 those kind of questions professors like to invite.
17 Let's think about what the Zoning Regs should be
18 about. My concern is if you have an owner -- I'm
19 speaking perhaps more broadly here as opposed to just
20 this particular itself.

21 As the Chair said, it's an important
22 question to sort out. If you have a property owner
23 that wants to do something, anything, with his or her
24 property, the Zoning Regs should step very gingerly
25 around the question of whether or not it should be

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1 allowed whether you want to go from a two bedroom to
2 a three bedroom or maybe some four bedrooms, but
3 rather sticking strictly within the confines of is
4 there a practical difficulty in the context of this
5 particular test.

6 Help me perhaps understand if I'm
7 misstating your position. That is one piece. But
8 just to kind of signal to the rest of the Board my
9 overall issue here, I agree with Mrs. Miller's
10 analysis in terms of the first prong. The second
11 prong I tend to disagree but I'm open to hearing a
12 little more discussion.

13 I think a lot of the conversation here
14 that I'm going to be interested in touching on will
15 get to the shadow issues. I think both sides did a
16 very strong job of laying out their respective
17 concerns about the impact of light primarily, not so
18 much air.

19 I tend to think that the argument here
20 still prevails in favor of the applicant but I want to
21 invite a little more conversation from my colleagues
22 on that issue of impact because I'm thinking primarily
23 about what could go on this site as a matter-of-right
24 and what that impact would be on the light and air to
25 the existing adjacent properties which I think would

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1 be somewhat similar to what we are potentially looking
2 at now. Obviously we have competing shadow studies
3 here that need to kind of be addressed.

4 VICE-CHAIRPERSON MILLER: I just want to
5 address the practical difficulty question because it
6 isn't just an economic threshold. What I'm trying to
7 say is when we are looking at the bigger picture and
8 you look at the cases, and when we have done our
9 analyses in other cases. You look at things like --
10 you do look at what is the driving need to a certain
11 extent for the variance and what would be the
12 practical difficulty if you didn't get it.

13 For instance, it can be with respect to
14 affordable housing, for instance, we have had to give
15 variances because otherwise they wouldn't have been
16 able to provide affordable housing. Or it could be to
17 enable a nonprofit to function properly
18 programmatically, that they couldn't do their program
19 unless they got the variance. Or space for a swimming
20 pool for recreation, for a Y or things like that.

21 There have been certain aspects that have
22 driven the need for the variance other than economics
23 so it's not just an economic question. When I look at
24 this case there isn't any of these other needs. This
25 one looks like purely an economic need. It isn't even

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1 a need because they are profiting.

2 CHAIRPERSON GRIFFIS: You're saying it's
3 part of the judgment of the Board to ascertain that
4 need or the persuasiveness of that need. For
5 instance, we've had variances in single-family
6 homeowners that want to put an addition on and they
7 say it's because they want a bigger kitchen. We don't
8 stand in judgment of whether they deserve a bigger
9 kitchen or not. Do we? Is that the threshold of
10 which their practical difficulty is?

11 VICE-CHAIRPERSON MILLER: That's part of
12 their case, though. They do say that. It's a quality
13 of life issue that they need it to be a little bigger.
14 It's there.

15 CHAIRPERSON GRIFFIS: Okay. Okay. That
16 may have been a bad example. I don't recall anytime
17 that the Board has granted something just based on
18 that but I understand that it is in those applications
19 but just based on that quality of life issue I'm not
20 sure.

21 All right. Following up on Mr. Etherly
22 point other comments?

23 MR. MANN: I guess one of the things I
24 don't understand about your argument about what is it
25 in the converse? If the applicant -- and not

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1 necessarily in this case, but generically if the
2 applicant had poor business acumen and ran his
3 business at a loss, would that mean that your position
4 changes on this?

5 VICE-CHAIRPERSON MILLER: No, I'm not sure
6 how the practical difficulty -- you mean it would be
7 more profitable to build on top?

8 MR. MANN: Rather than -- if the converse
9 were true and they were not making a profit but rather
10 sustaining a loss, would your argument change?

11 VICE-CHAIRPERSON MILLER: Their argument
12 would change but I don't --

13 MR. MANN: Would your conclusions change?

14 VICE-CHAIRPERSON MILLER: No, because I
15 don't think economics is normally enough. The fact
16 that they can make more of a profit would be reason
17 enough for the variance.

18 MR. MANN: Well, I don't necessarily
19 understand that. The bottom line is I don't agree
20 with your analysis there. I do think there is some
21 argument that the applicant makes regarding sort of
22 the structural impediments and these impediments that
23 have been placed on them by HBRP. I think that stands
24 on its own anyway.

25 CHAIRPERSON GRIFFIS: Anything else on

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1 that issue at this time? If there is nothing else, I
2 think it's a good framing of the rest of our
3 discussion which I think we can get further into and
4 finish up fairly quickly. There are specific elements
5 brought to this. We have talked now about uniqueness.

6 Then there are the elements of whether
7 impairing the intent and integrity of the zone plan
8 would be a detriment to the public good is another
9 element of public good and how the Board holds that in
10 judgment and understands and weighs that. I think
11 it's fairly clear and we can rely, in fact, on court
12 cases to direct us as we have in the past that the
13 public good is not specifically an individual's
14 interest but rather that of more of the general
15 public.

16 I think that is a prevalent issue here.
17 I'm actually going to again speak frankly. I am a bit
18 shocked, or at least surprised, I would say, that the
19 Board hasn't found that is more of the element of
20 major discussion and maybe we'll get into that. It
21 seems, as I said, we had numerous individuals what
22 were coming in opposition to this and parties, of
23 course, that participated.

24 I'll say I do always joke and try and
25 bring things to a certain levity in counting up the

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1 numbers of that, but in all seriousness we obviously
2 don't look at how many are for and how many are
3 against but rather the substance that is brought to
4 us. It does raise to the level, I think, of my own
5 looking at it and the seriousness and the substance of
6 how many people are in opposition to this.

7 There is no question that this is very
8 substantive opposition. Now our charge is to figure
9 out what is the basis of that substance. Mr. Etherly
10 touched on it just briefly but I think one of the
11 critical aspects is the impact of this to the
12 surrounding area.

13 I see that framed in several fashions but
14 generally speaking I see it as the general use,
15 enjoyment, and quality of life in the surrounding area
16 on that corner. That may well be impacted as is being
17 provided to us. Parking elements and traffic and
18 pedestrian access and viability on the sidewalk. It
19 also goes to the light and air of the adjacent
20 properties.

21 Let me begin with some of that in terms of
22 this light, sun/shadow study. We were asked to look
23 at buildings that were across the street from the
24 specific site. I want to dispense with that in my own
25 thinking that I found it not impacting those in any

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1 significant manner as the distance is substantial.

2 When I look at all of the elements, I want
3 all Board Members to kind of focus on these for a
4 moment perhaps to address and see where each is.
5 There are numerous photographs and then, of course,
6 the last filings of this. I have to say I would note
7 that in terms of the cycle of the sun I haven't seen
8 anything as we look at 24 on this structure that
9 significantly impacts the surrounding area.
10 Certainly --

11 MR. ETHERLY: Mr. Chair, if I could
12 interrupt real quickly. Could you just be sure to
13 orient us with respect to what photos you are looking
14 at because we do --

15 CHAIRPERSON GRIFFIS: I start with Exhibit
16 76 which is supplemental statement of the opponents.
17 This was in the hearing where we looked at it and it
18 was presented. I recall wanting to find the
19 persuasiveness of these. We had asked for the time
20 and the date.

21 This was taken, and it's No. 3, March 4th
22 at 11:33. No. 5 was the building across the street.
23 No. 4 also. No. 6 was a street shot. Looking at all
24 those it's only No. 1, the photograph -- so for all
25 six only No. 1 is actually showing that the adjacent

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1 building is getting a substantial amount of sun shed
2 on it. I then went to look to find the others in
3 terms of the direct sunlight.

4 I don't disregard the fact that it is
5 going to be impacted. Certainly it is. I think it
6 would be even more so persuaded because -- here it is.
7 Really the impact of that adjacent has to be based on
8 this 107 square feet of lot occupancy because that is
9 what we are being asked to review.

10 Although this is more precarious in our
11 deliberation because it isn't just that. It's not a
12 height variance but it is an addition that we are
13 being asked also. I understand it's a broader field
14 than just getting into specifically so I'm looking to
15 be persuaded in these issues.

16 I guess that is more of what I'm saying is
17 I'm opening up to other's view of what was submitted
18 through the hearings and then the post-submission of
19 the impact. Is there an element of persuasive
20 discussion on each side? That's what we need to hear
21 in terms of the detriment of the public good or
22 impairing the intent and integrity of the zone plan.

23 VICE-CHAIRPERSON MILLER: Well, I think
24 when you are looking at light, it's not just a
25 question of sunshine. I think it's a question -- I

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1 don't think there is really an issue that when this
2 building -- if this building goes up it's 10 feet away
3 from the Woodrow Apartment building that the people
4 who have windows on that side of the apartment
5 building are now going to be facing a wall and there's
6 going to be a detrimental impact at least upon them
7 that they are not going to get as much light or air as
8 they currently have. We can weigh that for what that
9 is.

10 I converse -- well, I think there
11 certainly was evidence about the ambience, the
12 character, the streetscape of this intersection. That
13 would be undermined by this addition. I wasn't
14 persuaded that this was in the public good merely
15 because it was adding residential units to the housing
16 market. Even though in general certainly the mayor
17 and the city is welcoming more housing units, it's not
18 necessarily in the public good depending upon where
19 they are placed.

20 CHAIRPERSON GRIFFIS: How is it not in the
21 public good?

22 VICE-CHAIRPERSON MILLER: Well, I think
23 you weigh it. It's not in the public good in the
24 sense that this structure is -- at least there is an
25 argument that it is undermining this historic

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1 character of the streetscape here and the ambience and
2 that it is taking away from the air and the views and
3 the light of the nextdoor apartment building. It is
4 increasing parking and traffic congestion in an area
5 that is already congested.

6 CHAIRPERSON GRIFFIS: Right. I think
7 those are critical elements. I think certainly the
8 historic character and the neighborhood character is
9 very important. I must say I have one strong feeling
10 of insurance that that will be reviewed and properly
11 addressed based on the fact that this is under review
12 by the Historic Preservation Review Board.

13 That doesn't mean that we step away from
14 our responsibility and jurisdiction in terms of that
15 aspect but I think we are not redundant of those
16 elements but look at the differing pieces. Where I am
17 in terms of the character is trying to ascertain where
18 in the parameters in the universe of the Zoning
19 Regulations does this become detrimental to the
20 character to the R-5 District or to the setting on the
21 site and the massing of this.

22 I look at the second level proposed, the
23 third level of this, and how it cuts back
24 substantially in the lot occupancy. Actually, the
25 massing studies for the sun and shade are informative

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1 for their massing qualities in addition maybe to the
2 other elements and information on it. It shows the
3 relationship of holding that corner.

4 It shows the relationship of height to the
5 adjacent building that it attaches to and it also
6 shows obviously its relationship to the building
7 across the open area. I'm not seeing anything arising
8 that is saying this doesn't fit within or create
9 something or move against the public good.

10 VICE-CHAIRPERSON MILLER: You're making
11 that assessment based on the massing. Is that right?

12 CHAIRPERSON GRIFFIS: Yes.

13 VICE-CHAIRPERSON MILLER: We certainly
14 heard testimony and received letters about how it
15 would interfere with the public good. I understand
16 what you're saying about how is that a zoning issue,
17 but I think that is written into our Zoning
18 Regulations. It is kind of a broad question that we
19 don't usually focus on too much.

20 CHAIRPERSON GRIFFIS: The fact that this
21 blocks a substantial indirect light and air into the
22 building adjacent is, in fact, showing that it is
23 against the public good?

24 VICE-CHAIRPERSON MILLER: My point is
25 going -- I don't even know if we have done it before

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1 but I think it's rare that we look at the ambience of
2 a corner, those kind of quality of life issues, in our
3 zoning cases. However, the way the statute is written
4 I think public good is written very generally, very
5 broadly, and I think that we could consider that.

6 CHAIRPERSON GRIFFIS: I don't disagree
7 with you. I'm actually asking you what specifically
8 you find is moving against it. How are you defining
9 that it doesn't meet the threshold of being in the
10 public good or, in converse, being against?

11 VICE-CHAIRPERSON MILLER: I have to look
12 more carefully in the record but I am referring to
13 letters and testimony that we got with respect to that
14 intersection which has been characterized as a meeting
15 place for neighbors and churchgoers and everyone. For
16 some reason the community feels that this will change
17 as a result of the addition.

18 CHAIRPERSON GRIFFIS: Right. I think --
19 I'm sorry. I'll let Mr. Etherly continue but I think
20 one of the elements in testimony that you are trying
21 to grab onto is this plaza feeling, this gathering
22 place and this openness and that was defined by one
23 level of retail and without anything else on top that
24 you have that kind of open feeling.

25 I wasn't sure that there is anything that

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1 I recall being presented in testimony with this
2 addition that would curtail any of the gathering or
3 the utilization. In fact, there is testimony to the
4 fact that if approved part of the renovation of this
5 is a restored development of the retail with new
6 windows and it may "pretty it up" as they say.

7 Mr. Etherly, I cut you off.

8 MR. ETHERLY: Thank you, Mr. Chair. I
9 just wanted to kind of continue along this line of
10 conversation. I think you are both very much in the
11 right place here with respect to this issue. I think
12 broadly speaking when you look at a lot of pictures
13 that we are grappling with, and just so some of our
14 audience members can see kind of some of the things
15 that the Board had to take a look at, there definitely
16 are some tough pictures here and I think you use an
17 excellent expression when you talk a little bit about
18 the plaza-esque feeling of this particular corner.

19 I think it was very clear in the testimony
20 and in the written submissions around a desire to
21 protect that because there is a cinch perhaps that it
22 is somewhat under seize. I am tending to not
23 necessarily find that argument entirely plausible but
24 I agree with where Mrs. Miller's questions and
25 concerns are coming from with.

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1 Again, in an artful attempt at kind of a
2 preface, let me kind of get to some specifics here.
3 Coming back to the issue of the two bedroom unit for
4 a second point, one of the pieces that I wanted to
5 highlight in Exhibit 92, which is the applicant's
6 proposed findings of fact and conclusions of law, at
7 page No. 4 in which is proposed finding of fact No. 11
8 there is a reference to part of the impact that would
9 be encountered if this were constructed as a matter-
10 of-right.

11 One of the things that was noted by the
12 applicant was the fact, and I'll read it directly, it
13 notes that if they had to drop the 107 feet off of the
14 plan to come into compliance, there is an argument
15 that there would be a shift, a counterclockwise shift,
16 in terms of the room orientation for the units.

17 As a result, there would be a greater
18 impact according to the applicant on the Woodrow units
19 to the south because of an increase in the wall that
20 would face those units. That is kind of one
21 consideration that I kind of just highlight here. I
22 think in larger part I continue to kind of grapple
23 with what could be built here as a matter-of-right
24 even in complete compliance with the Zoning Regs.

25 I think the applicant correctly notes that

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1 there would be definitely impacts. There is no issue
2 here about there not being some impact on light and
3 air to some of those adjacent properties and, in
4 particular, the Woodrow here. I think the applicant
5 is correct to highlight that is the Zoning Regulations
6 called to duty here to assure that there is a certain
7 level of light and air, or simply that there is a
8 sufficient level of light and air.

9 I think, again, that is where the argument
10 is here. The argument is on the part of the opponents
11 there is no going to be sufficient light and air if
12 this is allowed to be built. My concern is even if we
13 were to simply go matter-of-right, would you still
14 have kind of the same impacts.

15 Now the opponent's response to the sun and
16 shade submission was, indeed, very helpful in terms of
17 trying to lay out some of the kind of opposing context
18 here. I'm going to Exhibit No. 90. In particular, I
19 understand some of the comments that were made about
20 the shadow and sun study being somewhat misleading.

21 For example, not accounting for some of
22 the HVAC equipment and how that is going to impact the
23 Woodrow and other buildings. In particular they also
24 do discuss at some length the issue of what I refer to
25 as ambient light. In essence, that is part of what we

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1 are talking about, the soft light, if you will, that
2 helps contribute to the plaza feeling of this
3 particular intersection.

4 Again, I don't necessarily disagree that
5 there will not be an impact here but I'm struggling
6 with is the difference between the impact should this
7 variance be granted versus the impact if the
8 construction as a matter-of-right were to simply go
9 forward is that a large enough difference to call to
10 the question a zoning issue. I'm not certain if it
11 is.

12 VICE-CHAIRPERSON MILLER: My understanding
13 is that it wouldn't be built as a matter-of-right.
14 They couldn't do it as a matter-of-right. That's why
15 they are seeking --

16 MR. ETHERLY: The applicant is saying that
17 but the issue here is -- I think the strawman here is
18 what would the impact be if there were simply a
19 matter-of-right construction here because, if I
20 understand correctly, yes, the applicant doesn't want
21 to build matter-of-right. That's why they're here.
22 Let's just say for the sake of discussion that they
23 were to build matter of right. They could go 50 feet.
24 Correct?

25 Here we are not talking 50 feet. We are

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1 talking 42. They could go closer to the Woodrow than
2 what is proposed now. Under the current application
3 there is a setback and the terracing according to the
4 applicant allows for, shall we say, a softened light
5 impact with regard to the Woodrow that would otherwise
6 be part of a matter of right project if they were
7 building in that.

8 I think part of the zoning inquiry here,
9 at least part of the way I'm thinking about it is how
10 much is that difference? Is that different between
11 the strawman of the matter-of-right construction and
12 the proposed application? Is that difference enough
13 to raise a zoning issue?

14 It's another way of phrasing the same
15 question which is if you grant the fucking variance
16 -- I don't know how we are going to get that on the
17 transcript. Let's see if we can delete that reference
18 fucking. If you grant the variance what is the
19 impact? I'm just phrasing the question another way
20 but my strawman is if you built it matter-of-right
21 there are going to be impacts.

22 There is no doubt about that. The
23 question from a zoning standpoint is is there still
24 sufficient light and air allowed to the adjacent
25 properties. I think, in particular, the Woodrow here

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1 because I do tend to agree with the Chairman as we get
2 into some of the issues across the street some of the
3 pictures are very telling in terms of what they
4 already have to deal with from a light standpoint.

5 If the variance were granted is the impact
6 enough to eliminate a sufficient amount of light and
7 air. In particular it's really light, I think.
8 Again, a very rough summation of what I'm kind of
9 struggling with but I trust my colleagues are kind of
10 hearing the direction that I tend to be kind of
11 leaning in here.

12 Again, I'm really trying to be sure I
13 speak to some of the issues that were raised in
14 Exhibit No. 90 which is the opponent's response to the
15 applicant's sun and shade submission because I think
16 it was very helpful in terms of laying out their
17 assessment of not only the direct issue of sunshine on
18 the adjacent properties but also this issue of the
19 soft light, this issue of -- I wish I could find the
20 reference -- not necessarily just direct sunlight but,
21 as the opponents refer to it, the affect that the
22 addition would have on the soft and diffuse northerly
23 light that it receives for much of the day.

24 CHAIRPERSON GRIFFIS: Good. Ms. Miller.

25 VICE-CHAIRPERSON MILLER: I just want to

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1 respond that I don't think it is the correct analysis
2 to compare it to what could be built as a matter of
3 right. I think what you need to do in looking at the
4 variance test is go by the three prongs and look at
5 the impact from building this addition as presented to
6 us.

7 MR. ETHERLY: I would agree but don't --
8 I would not want to be so mechanical in the
9 application that we lose sight of the broader context
10 here. I agree with you definitely the variance
11 language has to be the anchor here but I think the
12 anchor is tied to a broader contextual picture that I
13 am trying to kind of give a little bit of voice to
14 here. I definitely don't disagree with you.

15 We are both saying the same thing in terms
16 of how we are couching the analysis. I am just
17 perhaps saying it in a slightly different way. To
18 stick it closer to the various language, I am just not
19 certain that the case has been made that the impact as
20 we get into that third prong. That is kind of where
21 I'm focusing this conversation here, the third prong
22 in the variance test. I'm just not sure if the impact
23 has been demonstrated sufficiently enough to raise a
24 zoning question.

25 VICE-CHAIRPERSON MILLER: I think that the

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1 plaza/gathering issue is somewhat amorphous to me, a
2 little bit vague as to what is the impact there of the
3 addition. I think certainly the impact on the Woodrow
4 apartments is explicit. I think we know what that is
5 going to be, at least as far as there is going to be
6 a wall 10 feet away and we know it is going to block
7 light. Some things I think are clearer than others.

8 CHAIRPERSON GRIFFIS: Indeed. Okay.
9 Other elements regarding the other variances
10 specifically 2003?

11 VICE-CHAIRPERSON MILLER: I think there
12 was some -- I know there was a lot of briefing on the
13 issues about whether or not this was appropriately
14 brought forth under 2001.3. I'm dealing with
15 nonconforming structures devoted to conforming uses.
16 I think there was a change in the regulation since
17 that Lincoln case and I think the applicants
18 appropriately cited 2001.3 in seeking the variance in
19 this case.

20 CHAIRPERSON GRIFFIS: What else?

21 VICE-CHAIRPERSON MILLER: The applicant
22 also sought a variance under 2002.4 because the
23 structure contained a nonconforming use which is the
24 grocery store. The addition is not an ordinary
25 repair, alteration, or modernization so they needed a

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1 variance from that provision as well. I guess I would
2 say my variance analysis would apply to all the
3 variances and so in the sense if I don't find a
4 practical difficulty with respect to one, I don't find
5 it with respect to all.

6 CHAIRPERSON GRIFFIS: Indeed. Okay. Are
7 there elements that we haven't touched on that need to
8 be mentioned or brought forth for deliberation? One
9 piece we didn't talk about there was testimony in
10 terms of the value by a relator that worked through
11 and on their basis of the market what she would put an
12 apartment with and then without the addition.

13 I thought that was informative but,
14 frankly, don't find it persuasive enough in its detail
15 for the comparison of what we needed to look at. Is
16 there impact? Of course. Is there other confluences
17 and factors? Is location an element? Is new
18 construction an element? There are a million and a
19 myriad of things. I did appreciate the opinions that
20 were stated but I won't find that the direction I go
21 would be based on elements that were presented in
22 that.

23 We had also some talk about noise. The
24 Woodrow is separated by 10 feet 6 inches from the
25 existing structure. The existing structure will rise

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1 to two levels above that for a small portion setback
2 at the same level in line. There is proposed to be
3 storage, trash, and also there was the talk of VESPA
4 parking for what it's worth down in that area.

5 Noise was another element that was brought
6 up in terms of the measuring factor of the proposed
7 addition. I would lay it out there for address as
8 needed.

9 VICE-CHAIRPERSON MILLER: I wasn't
10 convinced that there was going to be great detrimental
11 impact with respect to noise. People live in the city
12 and I don't think that was so convincing. Also the
13 decrease in property values. I think it is somewhat
14 speculative but still I'm not sure that falls into the
15 category of public good.

16 CHAIRPERSON GRIFFIS: Okay. Anything else
17 then?

18 VICE-CHAIRPERSON MILLER: I think when we
19 are thinking about public good we can think about
20 traffic, parking, light, air, in my view, and then
21 ambience as in public spaces.

22 CHAIRPERSON GRIFFIS: Right. I think one
23 of the other aspects of public good that factors into
24 this and all our reviews is our consistency and our
25 consistency in review of variances and that of what we

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1 require or have found to be meeting the test or not
2 meeting the test. That to me is obviously a very
3 general direction and reliance on a system. And then
4 getting into specifics, however, in this case I think
5 it would mean that we look at similar elements that we
6 view other applications for and measure them in
7 similar ways.

8 Let me start from the beginning and move
9 this ahead. I had great difficulty with this
10 particular application. I thought there was an awful
11 lot of persuasive information on each side. Some was
12 persuasive outside of the zoning elements but even so
13 factors all into what we take into consideration. As
14 I firmly believe, our jurisdiction is decided and very
15 specific and we are focused on looking and holding in
16 judgment those particular cases.

17 Ms. Miller has done an excellent job in
18 laying out the variance test. The variance test has
19 been interpreted differently over time but not that
20 extremely a variance. I think I would have to move
21 ahead and look at this in terms of uniqueness and the
22 elements that were presented and whether it was a
23 finding that had a unique aspect. I think it was
24 fairly persuasive that it did.

25 Based on the existing structure, the

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1 current nature of the structure the elements of use
2 also fall within that. The practical difficulty in
3 putting an addition to this property I believe is also
4 set forth. The practical difficulty, of course, comes
5 from two fashions and actually a fairly confluence of
6 factors, although not astronomical numbers of them.

7 One, the existing structure and working
8 within the framework of that structure. Two, the
9 elements of relief that come from the nonconformity of
10 the existing structure, of course, raised to a level
11 of practical difficulty and adding onto this building
12 no matter what based on our requirements of the
13 regulation.

14 The lot occupancy under 403 I think it was
15 shown somewhat persuasively the fact that the
16 circulation and layout for this based on the existing
17 structure and its use and the layout of the apartments
18 above would require the additional lot occupancy on
19 one level. It is noted, of course, and we are well
20 aware that the second level of the addition conforms
21 and comes under the lot occupancy requirement.

22 It is a complicated piece in terms of
23 2002.4 in many respects. One isn't allowed to
24 reconfigure nonconforming uses but really this project
25 doesn't go to reforming or expanding any sort of

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1 nonconforming use but rather how accommodating a
2 matter of right use on an existing structure, again
3 all going back to a unique aspect which arises the
4 practical difficulty from.

5 Then we have talked a substantial amount
6 about -- actually, we talked very little about whether
7 it would impair the integrity and intent of the zone
8 plan map as this is essentially in conformity with the
9 R-5-B in terms of the use, the height except for the
10 lot occupancy but it certainly doesn't fall outside of
11 the parameters of the zone district itself that would
12 render it to be totally different.

13 And public good. I think Ms. Miller is
14 correct that the public good can factor in numerous
15 elements. I don't think it goes specifically to one
16 individual's property rights and no one is asserting
17 that here but it does factor into the overall
18 character, environment, quality of life of the
19 specific location.

20 That also, I must say, adds a level of
21 complication for my own understanding of how to judge
22 this case. When we have a community and surrounding
23 area, I think it was fairly unanimous but certainly
24 unanimous to the fact that this commercial use, this
25 retail use was an amenity, something that was

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1 enjoyable.

2 You don't want that to go away. However,
3 that is what is the basis of part of the opposition's
4 case against, or holding against the addition.
5 Overall I don't see how the addition is actually
6 impacting negatively the public good. The light and
7 shadow studies, there is a point, and Mr. Etherly was
8 going through a lot of it in terms of the Woodrow and
9 how it's impacted, the indirect light.

10 Then there are points at which in the
11 evening there would be direct light. This building
12 will rise not to the full height of the adjacent
13 building. It will be separated by 10 foot 6. Again,
14 there is going to be impact but it is rising to the
15 level of interfering with the public good. I didn't
16 find that to be the level of which was persuasive in
17 the opposition's presentation of their case.

18 I would note the revised drawings of which
19 are now under our review, as I said, there is a
20 setback. The adjacent Woodrow building does build to
21 its own property line with fenestration on that
22 property line and then small insets that provide
23 window wells. This building as proposed has a
24 dimension of probably about 15, I forget exactly what
25 it is, that sets off the street but then opens up into

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1 the rear to the kind of center of the building open
2 spaces.

3 I find that opening shows in the plan very
4 well in terms of A2, the floor plans, and also A3, but
5 also in the massing that was provided. It shows, in
6 fact, that it is stepping away from the adjacent
7 building that will, in fact, allow for additional
8 light and air as the proposed addition raises above
9 the grade.

10 Lastly, as I indicated, I think Ms. Miller
11 is absolutely correct that we should hold in high
12 regard and concern the character and how this might
13 impact the surrounding area. For those elements that
14 I find we have before us, I don't think this would be
15 disruptive.

16 Again, I would say this will, in fact, go
17 through additional reviews, design reviews which will
18 be of critical importance, as well as review for the
19 investment and the renovation of the first level which
20 I would hope if this proceeds would be a great
21 addition to that corner.

22 I'll open it up to others.

23 VICE-CHAIRPERSON MILLER: I just want to
24 say that for me this case turns on the practical
25 difficulties prong. In reading the statute in the

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1 regulation, it says that the strict application of any
2 regulation adopted under 6-641.01 through 6-651.02
3 would result in peculiar and exceptional practical
4 difficulties to the owner of the property.

5 The court has basically said that
6 variances and practical difficulty question is a
7 judgment call for the Board. As long as it is
8 supported by findings in the record it will be upheld.
9 I would like to assert that I think that this
10 practical difficulty issue may be broader than some of
11 the members of the Board are interpreting it. It is
12 important that we be consistent in our application.

13 When I was reviewing the court cases I did
14 read in the Monaco case a cite to Anderson American
15 Law of Zoning in which Monaco says, "The BZA may be
16 more flexible when it assesses a nonprofit
17 organization. The public need for the use is an
18 important factor in granting or denying a variance."
19 They apparently object to standards when enabling acts
20 are applied differently in several kinds of uses.

21 I think that statement in addition to a
22 review of the court cases when they are looking at
23 practical difficulty say to me that we do look at --
24 we can look at in considering practical difficulty the
25 impact in general of denying the variance relief in

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1 general, not just the practical difficulty of creating
2 a design that would work .

3 In this case I don't think that it is
4 unduly burdensome to the owner if the relief were
5 denied in that there is a viable operation there
6 currently.

7 CHAIRPERSON GRIFFIS: Okay. Others?
8 Direction for action?

9 MR. ETHERLY: As we perhaps wind down, Mr.
10 Chair, I'm going to associate myself with your remarks
11 as they relate to the summary of the case. I will
12 highlight that what was very helpful and constructive
13 and difficult was definitely probably the two pieces
14 that I slept with over the weekend really were
15 Exhibits No. 33, the sun and shadow studies, that were
16 put together both by the applicant and the parties in
17 opposition.

18 Definitely they were excellent work and I
19 think it is worth highlighting as we have done in our
20 deliberation some of those issues that were raised, as
21 I think as the Chairman indicated, some of the
22 economic discussions as related to impacts potentially
23 on the rents that could be charged at the Woodrow, the
24 issue of sun and light as we have already talked
25 about. Those issues were substantially raised and

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1 debated by the parties in opposition. I just want to
2 commend the work that was done.

3 Also on the parts of the residents of all
4 those facilities. Again, I understand where my
5 colleague, Mrs. Miller, is definitely coming from but,
6 as Mrs. Miller knows, that is perhaps always my segue
7 to say that I still disagree with you. I understand
8 where you are coming from.

9 My concern is your analysis is in some
10 respects very broad and somewhat overly -- well, in
11 some respects broad but that is not necessarily a
12 final blow in this instance but I think it was
13 important to spend the time that we spent looking at
14 the clock and realizing that it is 12:44 and we are
15 halfway through June 6, 2006. That will be my only
16 reference to that today.

17 But I think it was important to have the
18 discussion because the points that you were raising
19 were critical in terms of trying to signal some sense
20 of where -- some sense of consistency on how the Board
21 grapples with this issue. I appreciate the argument
22 that was raised about the economic viability and the
23 profit, if you will, but, again, I don't accept the
24 reading that I think had been suggested around how we
25 treated that argument that was brought forward by the

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1 applicant about those two bedrooms and what the
2 applicant is trying to do there.

3 I think that is just a little too narrow
4 of a reading of the facts of this case under the
5 variance test. I will just stop there, Mr. Chairman,
6 and I am prepared to moved forward. Thank you.

7 CHAIRPERSON GRIFFIS: Excellent. Thank
8 you. Others? Anything else?

9 VICE-CHAIRPERSON MILLER: I just want to
10 clarify for the record that I did say that for me it
11 did turn on the practical difficulty question but it
12 also turns for me on the substantial detriment
13 question. I was convinced that there is substantial
14 detriment to the public good in this case with respect
15 to the Woodrow apartment building and the parking and
16 traffic congestion and possibly the public gathering
17 space.

18 CHAIRPERSON GRIFFIS: Good. I appreciate
19 all that. I think it is probably fairly clear the
20 hesitation by everybody that's looking at this in
21 terms of which direction to go, although fairly
22 decisive, I think, in our positions in terms of what
23 we are required to look at. I think it is appropriate
24 to continue our deliberations under a motion and then
25 add on to anything we need at this point.

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1 I would move approval of application 17446
2 of Willie Ney. That would be for the variances as
3 amended and project as amended for the lot occupancy
4 and also the addition to nonconforming structures,
5 2001.3 and 2002.4 at 2162 California Street, N.W. I
6 would ask for a second.

7 MR. MANN: Second.

8 CHAIRPERSON GRIFFIS: Thank you very much,
9 Mr. Mann. We do appreciate that. As I say, I think
10 we have articulated numerous amounts of the uniqueness
11 aspect to this. The one other to look at that we
12 haven't really talked -- well, I guess we have talked
13 about it, is the HPRB direction in terms of the design
14 and the placement of this and how that impacts the
15 setting and the unit layout and also the circulation
16 going through the building.

17 The structural reconfiguration of the
18 nonconforming use, of course, has been shown to be of
19 unique stature in terms of the basis of the use being
20 there in an R-5 zone to begin with. Also then the
21 requirements of the configuration based on the
22 residential or the mixed use, but the residential
23 above and how that has to comply with the building
24 code and the separation, etc.

25 The practical difficulties, I think this

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1 has been an excellent discussion and I think this
2 obviously will continue on other applications as we go
3 forward. This was a complicated case.

4 However, I believe that the practical
5 difficulties in complying with the Zoning Regulations
6 as we are charged to look at has been met in this case
7 based on the factors that, again, we have already gone
8 through numerous aspects of it but more towards the
9 placement and utilization of residential units which
10 we are well aware of requiring fenestration, layout,
11 circulation, egress. These are elements that
12 obviously we have to take into consideration as you
13 try to comply with the lot occupancy requirements and
14 other elements of the requirements.

15 Moving to the zone plan, would it be so
16 out of character with the R-5-B zone? I don't think
17 there has been anything presented to be persuasive in
18 that manner. The public good, of course, we talked
19 about that and its impact on the surrounding area. I
20 would note that for most of the year and most of the
21 time of the year the sun is behind the Woodrow and
22 comes around it for evening light.

23 There is the impact of the actual proposed
24 massing would be limited in terms of impacting the
25 direct light into the building but that doesn't

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1 diminish the fact that there would be, in fact,
2 impact. However, I didn't find it to be at the level
3 of detriment that would require my not supporting the
4 request for variances as amended. I'll open it up to
5 others. Any other comments? Very well.

6 We are still on the motion, of course, and
7 I would note that we have had, as we limitedly
8 discussed in the very beginning of this, additional
9 submissions put in that were not received and those
10 would, of course, be returned by the Director of the
11 Office of Zoning to the sender and not be part of the
12 record as we go forward with this.

13 That being said, I appreciate everybody's
14 work on this. This has been an incredible amount of
15 very detailed and excellently prepared information on
16 all sides. We do have a motion before us. It has
17 been seconded and I would ask for all those in favor
18 to signify by saying aye.

19 MEMBERS: Aye.

20 CHAIRPERSON GRIFFIS: And opposed.

21 VICE-CHAIRPERSON MILLER: Opposed.

22 CHAIRPERSON GRIFFIS: Excellent. Mr. Moy,
23 if you wouldn't mind recording the vote.

24 MR. MOY: Yes, sir. Staff would record
25 the vote as three to one to one. This is on the

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1 Chair's motion to approve the application as amended,
2 seconded by Mr. Mann. Also in support of the motion
3 Mr. Etherly. We have no Zoning Commission member
4 participating.

5 CHAIRPERSON GRIFFIS: Excellent. Thank
6 you very much, Mr. Moy.

7 Let's move ahead.

8 MR. MOY: The next case is a request for
9 Modification of Approved Plans, pursuant to Section
10 3129. This is to Application No. 17319 of William J.
11 McKeever. The decision to this application was
12 pursuant to 11 DCMR 3104.1 for a special exception to
13 allow a rare addition to an existing single-family row
14 dwelling under Section 223 not meeting the court
15 requirements, Section 406 and the DC/R-5-B District at
16 premises 1723 Riggs Place, N.W. (Square 153, Lot 104).

17 On March 31, 2006, the applicant made a
18 filing requesting this modification of approved plans
19 and this is in your case folders identified as Exhibit
20 43. The Board approved this application on June 7,
21 2005. The final order was issued on February 1, 2006.
22 The Board is to act on the merits of the request for
23 modification of approved plans pursuant to Section
24 3129.5.

25 No parties have filed comments within the

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1 10-day period following the request for modification
2 pursuant to Section 3129.4. However, the Board did
3 receive a letter dated May 25, 2006, from ANC-2B. The
4 Board should take that filing as a preliminary matter
5 since this was received outside the 10-day period
6 pursuant to 3129.4 of the Zoning Regulations. I think
7 staff will conclude at this point, Mr. Chair.

8 CHAIRPERSON GRIFFIS: Mr. Moy, you
9 indicated 46 came in untimely. Is that correct?

10 MR. MOY: That's right. That's the letter
11 from ANC-2B and it's dated May 25 which is
12 approximately 50 some days after the issuance -- after
13 the request for approved plans which would be March
14 31st.

15 CHAIRPERSON GRIFFIS: Okay. Let me ask
16 you just for quick clarification. This is timely for
17 a request for modification or are we needing to waive
18 our time requirements? Or are there time requirements
19 for bringing them?

20 MR. MOY: That's interesting. Generally
21 for all parties to the case there is a 10-day window
22 to file. I mean, this is the ANC.

23 CHAIRPERSON GRIFFIS: I'm talking about
24 the application.

25 MR. MOY: Oh, the application is timely

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1 because the date we are looking at is the issuance of
2 the order which is February 1st.

3 CHAIRPERSON GRIFFIS: February 1.

4 MR. MOY: That's correct.

5 CHAIRPERSON GRIFFIS: Okay. That's the
6 clarification I needed. Okay. Let me hear any
7 opposition to taking into the record Exhibit 46. Of
8 course, this is something that procedurally is
9 requested. This is very late in terms of 50 days, not
10 10, from the ANC. We could return it or open the
11 record to accept it. Let me hear from others.

12 VICE-CHAIRPERSON MILLER: I think we
13 should accept it. I think it's important to have the
14 ANC's position on this and there isn't any prejudice
15 to the applicant.

16 CHAIRPERSON GRIFFIS: Understood. I think
17 as this is part of the procedural request that we
18 make, although it is late, certainly we can afford
19 them a little additional time. If there is no
20 opposition we will accept it as Exhibit No. 46. Now
21 we can look at the substance of it or take no position
22 on the proposed modification.

23 That being said, let's move straight into
24 the issuance and dispense of this very quickly. This
25 is a request for modification, as Mr. Moy has

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1 adequately laid out. This is a hearing we already
2 proceeded through and approved. This is adding an
3 additional few square feet onto a very small addition
4 to begin with.

5 The original addition in my recollection
6 was about four feet eight inches by five feet seven
7 inches. We are adding about two feet to it. I think
8 what is of critical importance for our review and
9 decision on this to move ahead is the fact that this
10 would not materially or significantly impact the
11 relief that was sought. Basically the test that was
12 already made that it is not being impacted and I would
13 support it. To expedite I would move approval of the
14 request for minor modification of the approved plans
15 in Application 17319 and ask for a second.

16 MR. MANN: Second.

17 CHAIRPERSON GRIFFIS: Thank you, Mr. Mann.
18 Comments or questions? Any further discussion? Then
19 one note. I am sure that we won't have further -- how
20 to say this? Very well. If there are no other
21 further comments, there is a motion before us that has
22 been seconded. All in favor signify by saying aye.

23 MEMBER: Aye.

24 CHAIRPERSON GRIFFIS: Opposed?
25 Abstaining?

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1 VICE-CHAIRPERSON MILLER: Abstaining.

2 CHAIRPERSON GRIFFIS: Very well. Thank
3 you very much.

4 Mr. Moy, would you mind recording the
5 vote?

6 MR. MOY: Yes, sir. Staff would record
7 the vote as three to zero to two. This is on the
8 motion of the Chair to approve the modification of
9 approved plans, seconded by Mr. Mann. Also in support
10 of the motion Mr. Etherly. We have Ms. Miller
11 abstaining and we have no Zoning Commission member
12 participating.

13 CHAIRPERSON GRIFFIS: Just by the skin of
14 our teeth then. Very well. Thank you very much. I
15 take it then that the motion passed with three votes
16 which would be a majority of the Board with one
17 abstaining and one not voting.

18 MR. MOY: That's correct.

19 CHAIRPERSON GRIFFIS: Okay. Let's move
20 ahead then. Call the next case for decision.

21 MR. MOY: The next case is Application No.
22 17464 of Sherman Arms, LLC, pursuant to 11 DCMR 3104.1
23 for a special exception to allow a community service
24 center under Section 334 in the R-5-A district at
25 premises 700 block which is the cul-de-sac of 8th

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1 Street, S.E., Square 6209, lots 28 through 31. Staff
2 would note that the last hearing on May 9, 2006, it
3 was established that the square and lot numbers were
4 correct but there is some ambiguity about the
5 correctness of the street address.

6 At any rate, on May 9, 2006, the Board
7 completed public testimony on the application, closed
8 the record, and scheduled its decision on June 6. The
9 Board requested no additional information. However,
10 the ANC was allowed to file to clarify the Advisory
11 Neighborhood Commission's two earlier reports dated
12 March 1, 2006, and May 8, 2006. Staff will conclude
13 at this point, Mr. Chair.

14 CHAIRPERSON GRIFFIS: Excellent. Thank
15 you very much. Let's move right into this then.
16 Well, I think the record is very full on this and I
17 think it is actually more productive for the Board to
18 deliberate under a motion whether it passes or not,
19 but I think it would expedite things and I would move
20 approval of Application 17464.

21 That is for the special exception which
22 would permit a community service center in square
23 6209, lots 28 through 31 at 8th Street, S.E. as
24 proposed by the applicant which is noted as
25 Chesapeake. I would ask for a second.

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1 VICE-CHAIRPERSON MILLER: Second.

2 CHAIRPERSON GRIFFIS: Thank you very much.

3 I'll note, and Mr. Moy made reference to this, that
4 this didn't have address and we were always addressing
5 the subject site by its lot and square numbers and I
6 think that is appropriate. Just to lay the framework
7 here, of course, this was off of Chesapeake and 8th
8 Streets on a small cul-de-sac. It is separated by
9 that cul-de-sac which is a public right of way and
10 alleys on each of the additional sides.

11 It is a very interesting shaped lot. This
12 is being proposed to be developed into what is called
13 a community center. We have, as the applicant as laid
14 out, the entire program, the time, the use that would
15 be primarily for the use of the adjacent properties,
16 the apartment buildings rather, the developer is
17 actually redoing. They are proposing this to serve
18 that population.

19 I think we will have some discussion on
20 the larger piece. Let me just frame the fact that
21 some of the concern of the surrounding areas was this
22 was going to be built but no one could use it. It
23 would be more like a private club, not their words,
24 mine, but private club rather than a real community
25 center.

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1 Of course, that had to be balanced with
2 the fact that they were concerned with the amount of
3 traffic that might come to and from or who might be
4 using it. It is a delegate balance if you open it up
5 for the general public of which you have no control or
6 you would have a dedicated population. I don't think
7 it rises to a major concern in my mind and my
8 deliberation because, one, I found that the program as
9 laid out is very substantive and I think very thought
10 out.

11 It is looking to serve a population, a
12 community I would say, that the Chesapeake Village,
13 which is being renovated and developed, is going to be
14 filled with and the surrounding area. There is a
15 memorandum of understanding as is in the record which
16 was informative in terms of the openness of the
17 program.

18 Certainly they don't want to have empty
19 areas and nonuse so I am assured that if the apartment
20 population was not using this to the best of its
21 ability, certainly they would fill it with those
22 others that might want to use it. Just to have an
23 amenity like this, I think, is a positive aspect as
24 opposed to when we look at the special exception, of
25 course, is looking to the potential or the actual

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1 creation of detrimental impact.

2 Something of this nature might well be
3 able to be used as is proposed to do adult training
4 and after school programs, but even more so the kind
5 of unprogrammed type and elements. There might be a
6 community meeting around a specific issue that needs
7 to be dealt with immediately and they need a place to
8 meet and this will facilitate that.

9 That being said, I would also note the
10 Office of Planning's Report which was an excellent
11 analysis in support of the special exception and the
12 criterion 334 of which this falls under. The
13 community center is not to be located to create or be
14 detrimental or objectional conditions.

15 Again, just the separation of this from
16 the adjacent areas I think limit any detrimental
17 impact from being created. I found that the
18 architectural element or the architectural style of
19 this was intriguing and set itself apart as a
20 community center, something different, but not in
21 total contrast to the residential area around.

22 Certainly it didn't rise to any other
23 objectional conditions and we didn't have any other
24 additional testimony or persuasive evidence in terms
25 of objectionable noise or use of this. There are

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1 other requirements in 334 that actually have no real
2 bearing on this in terms of structural alterations and
3 the like. This is a new building. I'll leave it at
4 that at this point and open it up to others for their
5 comment.

6 Mr. Mann.

7 MR. MANN: I thought their apparently
8 successful implementation of similar programs in other
9 areas outside Washington also provided evidence that
10 they can successfully employ programs like this while
11 still taking into consideration the local
12 requirements, Zoning Regulations or otherwise.

13 I wasn't left with the impression that
14 they have never dealt with issues like this before.
15 Just through programming they can successfully address
16 some of the issues that we might otherwise look for
17 strongly at for untested or otherwise never before
18 attempted programs.

19 CHAIRPERSON GRIFFIS: Excellent point.
20 Others?

21 VICE-CHAIRPERSON MILLER: It certainly
22 appears to be a very impressive center which I think
23 will be a great benefit to the public and the
24 community around it. I just want to address briefly
25 that there was an issue as to which ANC letter should

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1 be given great weight. There was the March 1st letter
2 and then there was the May 8th letter. Basically I
3 believe that each of those didn't meet the
4 requirements that we set forth in 3311.5.

5 What that means is basically that the
6 Board is not required to address the issues raised in
7 those letters with particularity. However, I want to
8 emphasize that we heard from the ANC commissioners and
9 the members of the public and the Board has actually
10 weighed very heavily all the concerns that were
11 addressed. In particular, I heard that the
12 surrounding community wants to be able to use the
13 center if they can.

14 As the Chairman said, the applicant has
15 represented that the center would be open to the
16 surrounding immediate community as space permits and
17 that is set forth also in their letter of
18 understanding dated February 17, 2006, that is
19 attached to Exhibit 24.

20 CHAIRPERSON GRIFFIS: Excellent. Others?
21 Anything else? I'll just take note, of course, it was
22 not refuted as operating as a nonprofit which is also
23 another criterion in 34 for the special exception
24 under the R-5-A. Very well. If there is nothing
25 further then, let us move ahead. We do have a motion

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1 before us. It has been seconded. I would ask for all
2 -- let me bring up one comment.

3 Mr. Moy, do you have -- there is an
4 element from our Zoning Commission that was brought up
5 that I think we probably need to discuss in terms of
6 any sort of screening that might happen on this alley.
7 As you know, there is a large -- well, there's
8 hundreds of feet, linear feet, surrounding this
9 property.

10 On the project north side of this is the
11 single-family residential. Of course, Chesapeake and
12 the corner on 8th Street there was some limited
13 discussion but discussion clearly on the fact of how
14 that might be screened. I think we could take up a
15 quick discussion on that and whether that would factor
16 into our conditions of any sort.

17 My opinion is this, the site plan that is
18 proposed and the layout of the building with the
19 surface parking I think is very adequate in terms of
20 defining that site. The fact that it is separated by
21 a public right of way and three alleys I think is
22 enough separation. I think by putting up any sort of
23 hard, solid fence of six or seven feet high I think
24 actually would look more kind of more a bunker element
25 or closing off and differentiating it in what I don't

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1 find is a very productive way.

2 I would certainly encourage good
3 landscaping on that side and trees but I think it is
4 a positive element, the open space. Then, lastly, one
5 of the pieces, I'm not sure how far the fencing could
6 go because we do have that surface parking lot and the
7 ingress and egress off of that alley. It would have
8 to be set back from the alley itself. In that sense
9 I wasn't of the thought that a physical fencing was
10 required based on any of the evidence that was brought
11 forward but certainly encourage the landscaping of
12 that and those edges. Others?

13 VICE-CHAIRPERSON MILLER: I also would not
14 want to impose that as a condition because I don't
15 recall testimony that really addressed or raised
16 adverse impacts that would correct. It just wasn't
17 addressed at the hearing as far as I can tell. I
18 can't see that it is needed. If it is needed, the
19 applicant certainly has the ability to add it later.

20 CHAIRPERSON GRIFFIS: Good. Okay. If
21 there is nothing further on that, then we do have a
22 motion before us. I would ask for all of those in
23 favor signify by saying aye.

24 ALL: Aye.

25 CHAIRPERSON GRIFFIS: And opposed?

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1 Abstaining? Very well.

2 Mr. Moy.

3 MR. MOY: The staff would record the vote
4 as four to zero to zero on the motion of the Chair to
5 approve the application seconded by Ms. Miller. Also
6 in support of the motion Mr. Etherly and Mr. Mann. We
7 also have an absentee ballot from Mr. John Parsons and
8 his vote is to approve the application. I guess
9 earlier that was my seque because Mr. Parsons has a
10 suggestion which was to -- his suggestion was
11 condition on a six-foot high -- let me read this. "A
12 six-foot high wood stockade fence to be erected on the
13 property line along the length of the alley which is
14 approximately 300 feet long."

15 CHAIRPERSON GRIFFIS: Excellent.

16 MR. MOY: So, again, the total vote would
17 be -- the final vote would be five to zero to zero to
18 approve.

19 CHAIRPERSON GRIFFIS: Good. Thank you
20 very much. Appreciate that. Okay. Noting we have
21 one more case to decide this morning, but also noting
22 that it's 1:10, I would imagine the folks are probably
23 here for the afternoon session and I would advise you
24 that we will finish this last deliberation and we will
25 need to take a break for lunch and blood circulation

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1 walk outside. We would call the afternoon session to
2 order no sooner than 2:00.

3 It comes to my attention two things, first
4 of all, procedurally. Board Members, the last
5 decision that we just made I believe we could waive
6 our rules and regulations and issue a summary order
7 unless there is any objection to that. is there an
8 objection? Do we have the ANC? Is it clear enough to
9 do that?

10 MR. RITTING: Out of an abundance of
11 caution I think I should probably do a full order.

12 CHAIRPERSON GRIFFIS: Sure. Let's do a
13 full order actually because that is an important piece
14 to bring up that we have some findings of fact that I
15 think are critical as part of our point. We'll do
16 that and issue a full order on that.

17 I have just been handed, of course --
18 well, not, of course -- been handed the fact that we
19 have a preliminary matter in one of our cases in the
20 afternoon so what I want to ask is the Board's
21 indulgence. We will finish our deliberation and
22 immediately call the afternoon session. We will
23 dispense with the preliminary matter and then we'll
24 break for lunch. We will break actually within our
25 afternoon session because procedurally we can't deal

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1 with anything that has to do with the hearings at this
2 point.

3 That being said, let's call the last case
4 for the morning's decisions.

5 MR. MOY: The next and last case, Mr.
6 Chairman, is Application 17459 of DC Hampton, LLC,
7 pursuant to 11 DCMR 3103.2 for a variance from the
8 residential recreation space requirements under
9 Section 773 to allow the construction of a 28-unit
10 multiple dwellings in the Arts/C-3-A District at
11 premises 1446-1454 Church Street, N.W. (Square 209,
12 lots 911 and 917).

13 Staff would note for the Board that the
14 applicant amended the application at his last hearing
15 to provide zoning relief from the parking requirements
16 under Section 2101.1 if the Board believed that the
17 variance relief was required. However, at the hearing
18 the Board determined that the applicant's parking
19 variance relief was not necessarily needed.

20 Finally, the applicant also clarified that
21 the notice to indicate a change of unit from 28 to 27.
22 So on May 2, 2006, the Board completed public
23 testimony on the application, closed the record, and
24 scheduled this decision on June 6. The Board
25 requested no additional information at the conclusion

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1 of the hearing. That completes the status briefing.

2 CHAIRPERSON GRIFFIS: Thank you very much,
3 Mr. Moy. Forgive me because I am now reading what was
4 handed to me. My understanding is that ANC-6A is
5 withdrawing their appeal? Is that correct? Okay. In
6 which case there is no action from the Board that
7 needs to be taken if that has been withdrawn.
8 Obviously we accept that but I don't think we need to
9 call up anything. We can make an announcement of it
10 in the afternoon so that may free up everybody's time.
11 Thank you very much.

12 Okay. Let's move ahead then. As Mr. Moy
13 has indicated, application 17459 of DC Hampton, LLC.
14 Let's move right into this. This was, as indicated,
15 amended several ways. One was in concurrence
16 regarding the parking with the Board's review of this.

17 I would just note for the Board to look at
18 this and see that the variance from the parking
19 requirement of 2101.1 was not required and that was
20 referencing, of course, 2100.5 which reads, "No
21 additional parking spaces shall be required for a
22 historic landmark or building or structure located in
23 an historic district that is certified by the State
24 Historic Preservation Officer as contributing to the
25 character of that historic district." That has, in

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1 fact, been documented as a case in this particular
2 application.

3 Moving ahead then to the other elements of
4 which relief was being sought. Going to the
5 residential recreation requirements, I think it is
6 probably appropriate to do this under a motion. I
7 would move approval of Application 17459 at premises
8 1446-1454 Church Street, N.W. that is proposed to
9 allow construction of 27 multiple residential units.
10 I would ask for a second.

11 MR. MANN: Second.

12 CHAIRPERSON GRIFFIS: Thank you very much,
13 Mr. Mann.

14 Going into this, of course, we did look at
15 a couple of particularly unique aspects of this that
16 arose as to the practical difficulty. We have an
17 existing structure on this site. The site is in a
18 small and somewhat uniquely shaped but not incredibly
19 uniquely shaped lot. Adding onto the building and
20 also putting a contemporary multiple residential
21 proposal there, indeed, also with the other views and
22 the design aspects of this it was found to be
23 practical difficulty in complying with the entire
24 residential recreation space afforded.

25 In fact, none of the residential

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1 recreation space required would be provided. We would
2 take note that with the pushing back and the massing
3 of this, a lot of which came out of the review, the
4 designer review of HPRB, that there are provided
5 outside spaces, of course, that don't count towards
6 the residential recreation requirements because they
7 are out of individual units but it does go to the
8 aspect of where one could go out and be part of the
9 outdoor area.

10 The other aspect that I think that we
11 found now with the hundreds of thousands of requests
12 for variances from residential recreation is that the
13 other uses of it. As we always ask, "What would you
14 use it for and why would you need it?"

15 I think we have found and, in fact, the
16 last application that I recall just last week, I think
17 it was, the larger buildings do require or have some
18 need for and, in fact, there is a market for it.
19 Certainly our requirements have those needs as we get
20 into the 100 and 200 and 300 units. What we have here
21 in a 27-unit, my point being, is that the requirement
22 for that type of space.

23 Not only that but the impact of providing
24 it is so difficult.

25 In fact, one of the sides of the proposed

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1 project is the most persuasive practical difficulty in
2 providing the entire residential recreation space. Of
3 course, we looked at the fact that this would not
4 require parking as in terms of the count of 2101.1 but
5 there is parking provided. We looked at the diagrams
6 of how one would access that and how we might
7 reconfigure it to get residential recreation space.

8 I think in my mind we do have to factor
9 into the balance of what do you provide and how nice
10 of residential recreation space is provided below
11 grade. What we see in that is more kind of workout
12 areas and as we balance out -- not necessarily the
13 most persuasive element of this but as we balance out
14 what would be better provided, that or the residential
15 recreation space, it certainly comes into play that it
16 provides for this specific application a little bit
17 more compelling to provide the relief for that.

18 That being said, I don't have any other
19 particular aspects to add to this. I'll open it up to
20 others if they have.

21 VICE-CHAIRPERSON MILLER: I just want to
22 add like similar cases with small buildings it is much
23 more difficult it seems for the applicant to provide
24 the amount of residential rec space. In this case
25 were they to provide the amount of indoor residential

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1 recreation space they would have had to devote two
2 units and more than half a floor to residential
3 recreation space.

4 It is also very complicated here by the
5 fact that there is an historic structure already there
6 and they couldn't work around it to provide rooftop
7 recreation because of the multiple setbacks.

8 CHAIRPERSON GRIFFIS: Excellent. I think
9 to add on to that we often look at or it is provided
10 often on the roof because of the outdoor space
11 requirements. This based to the fact that historic
12 preservation was creating a roof plan that didn't
13 easily allow for that. Also the mechanical units that
14 were placed on the roof diminished the size. Of
15 course, there is a dimensional requirement for rooftop
16 residential recreation space provided.

17 Okay. Anything else then? Very well. If
18 there is nothing further, we do have a motion before
19 us. It has been seconded. I would ask for all those
20 in favor signify by saying aye.

21 ALL: Aye.

22 CHAIRPERSON GRIFFIS: Opposed?
23 Abstaining? Very well.

24 MR. MOY: The staff would record the vote
25 as three to zero to two on the motion of the Chair to

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1 approve the application, seconded by Mr. Mann. Also
2 in support of the motion Ms. Miller. We have Mr.
3 Etherly not participating on this case and Ms. Mitten,
4 the Zoning Commission Member, participating but not
5 present and not voting.

6 CHAIRPERSON GRIFFIS: Excellent. Thank
7 you very much, Mr. Moy. Is there any other business
8 before the Board for the morning session? Probably
9 not. Very well. If there is no other business for
10 the Board in the public meeting --

11 MR. MOY: I'm sorry.

12 CHAIRPERSON GRIFFIS: I believe we have
13 been through our entire chronology or agenda which was
14 substantial. I do apologize for us running late this
15 morning and into the afternoon having just decided
16 upwards of seven cases. We will break and adjourn our
17 morning meeting. With that, we are going to take a
18 short lunch break.

19 There is a withdrawal if you are here for
20 the afternoon appeal of 17482 so you might want to
21 check with staff. It has been withdrawn and will not
22 proceed today. We have one case for the afternoon and
23 we will call that at 2:30, 17483. Thank you.

24 (Whereupon, at 1:24 p.m. the meeting was
25 adjourned.)

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